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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, EAL CHAPTER, AFL-CIO,
Petitioner

v.

EASTERN AIR LINES, INC., and AIR LINE PILOTS ASSOCIATION,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

EASTERN AIR LINES, INC., and AIR LINE PILOTS ASSOCIATION,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Flight Engineers' International Association, EAL Chapter, AFL-CIO, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Appendix A, *infra* p. 1a) is reported officially at 311 F.2d 745; it is reported unofficially at 52 L.R.R.M. 2153.

The opinion of the District Court is reported officially at 208 F. Supp. 182; it is reported unofficially at 51 L.R.R.M. 2105.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The judgment of the Court below was entered on January 4, 1963.

The jurisdiction of the District Court was based upon 28 U.S.C. § 1337.

QUESTIONS PRESENTED

In this case, suit was brought in a federal court to restrain an air carrier subject to the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, from violating that Act by refusing to bargain in good faith with the certified union, by bargaining with a union which is not authorized to represent the employees in question, and by interfering with the employees' free choice of a bargaining representative. The Court below, characterizing the dispute as a "jurisdictional" or a "representation" dispute, ruled under the authority of *General Committee* v. *Missouri-Kansas-Texas R.R.*, 320 U.S. 323 (1943), that the federal courts are without jurisdiction to grant relief against such violations, which jurisdiction admittedly would exist under *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515 (1937), in the absence of the characterization of the dispute as "jurisdictional" or "representation."

The questions presented are:

1. Did the Court below properly apply the doctrine of *M-K-T* to this case, where the effect of such application is to obliterate rights guaranteed by the Railway Labor Act, and to leave Petitioner remediless? and

2. If it did, should that doctrine continue to be followed by this Court?

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions of the Railway Labor Act involved in this cause are set out in Appendix B, *infra* p. 7a.

STATEMENT OF THE CASE

Introduction

This cause represents another episode in the chronicle of efforts by Petitioner, EAL Chapter, to protect its bargaining rights under the Railway Labor Act, and to resist violations of that Act by Eastern Air Lines in matters directly affecting those bargaining rights. One such episode has been before this Court on petition by EAL Chapter for a writ of certiorari in *Flight Engineers' International Association, EAL Chapter, AFL-CIO* v. *Eastern Air Lines, Inc.*, No. 776, 1962 Term, *cert. denied*, 31 U. S. L. Week 3298 (U. S. March 18, 1963). The instant Petition relates to unlawful conduct of Eastern distinct from and far more extensive than that complained of in No. 776, including acts which occurred subsequent to the hearing in the District Court in No. 776.

In No. 776, the issue was restricted to the question of whether during a strike a carrier may unilaterally impose changes in working conditions as to which it had not filed the notice required by Section 6 of the Act, and may bargain individually with the strikers with respect to such matters. After the events which gave rise to No. 776 had occurred, Eastern, as noted more fully below, embarked on a course of conduct which included bargaining and entering into agreements directly affecting the flight engineers with the Air Line Pilots Association (hereinafter "ALPA"), even though EAL Chapter and not ALPA had been selected and certified as the representative of the flight engineers; refused to bargain in good faith with EAL Chapter or to enter into any agreement with that union; and interfered with and coerced the flight engineers in their choice of a bargaining representative. It is this conduct that gave rise to the instant suit.

Background of the Instant Dispute Between EAL Chapter and Eastern

As required by federal regulation of all air carriers, the larger piston aircraft and all of the turbine (i.e., prop-jet

and pure jet) aircraft operated by Eastern have cockpit crews consisting of pilots and a flight engineer. The pilots and flight engineers on Eastern have long been recognized as separate crafts or classes,[1] and have been represented in collective bargaining by separate labor organizations, the pilots by ALPA and the flight engineers by EAL Chapter.

In 1956, ALPA, faced with the imminent threat of a surplusage of pilots and a declining membership because of the tremendously increased productivity of the jet equipment, embarked upon an industry-wide program calculated to displace flight engineers represented by the Flight Engineers' International Association, and to supplant them with pilots represented by ALPA.[2] In 1958, when Eastern was faced with this attempt by ALPA to appropriate the bargaining rights of the EAL Chapter and to confiscate the job of the

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[1] Flight engineers under federal aeronautical regulations perform a distinct function, separate from pilots and other cockpit or aircraft personnel. *Compare* 14 C.F.R. §§ 20.40-20-45.1; 40.281-40.283; 40.302-40.304; 41.48-41.53b; 41.53j; dealing with pilots; *with* 14 C.F.R. §§ 35.1-35.44; 40.284; 40.307-40.307.1; 41.53d; 41.73-41.77; dealing with flight engineers.

[2] ALPA at its 14th Convention in 1956 stated its mandatory policy with respect to the pilot qualifications for all members of the cockpit crew, including flight engineers, as follows:

"Resolved that it shall be the policy of the ALPA that *all members of the operating crew shall be pilot qualified*, and

Be it further resolved that it shall not be inconsistent with the implementation of this policy for the association to provide job protection for currently employed non-pilot operating crew members, and

Be it further resolved that the Board of Directors at the 14th Convention adopt as mandatory ALPA policy, that *no Turbo-Prop or Jet Turbine Powered Aircraft will be operated unless and until it is manned at all flight stations, by a qualified pilot* in the employ of the company as a pilot, and

Be it further resolved that the 3rd crew member requirement, on present and future aircraft be continued, and

Be it further resolved that crew members shall be known as Captain, First Officer, Second Officer, Third Officer, Fourth Officer, etc., *and under no circumstances will such pilots be referred to as Flight Engineer*, Navigator, Radio Operator, etc., and every effort shall be made to encourage standard usuage of these recommended titles. . . ." (Emphasis added.) See Compl. para. 9.

flight engineer, it refused to become a party to this scheme. It faced up to its obligations under the Railway Labor Act to deal only with the freely chosen representative of flight engineers, the EAL Chapter.[3]

However, it was not long before Eastern capitulated to the pressures of ALPA and set in motion the process which led ultimately to the violations of the Act here involved. On November 12, 1958, Eastern entered into a secret labor agreement with ALPA in which Eastern agreed to fly its pure jet aircraft with at least three pilots, rather than the theretofore two.[4] Unable to displace the flight engineer from the cockpit, ALPA had succeeded in adding a third and useless pilot [5] to the crew which already consisted of a pilot, copilot and a flight engineer.

When Eastern agreed with ALPA to add this third pilot to the crew, it had been for some time in negotiations with EAL Chapter over the terms of a new agreement covering flight engineers. On December 31, 1958, an agreement was

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[3] ALPA, in support of its demand upon Eastern for pilot qualified flight engineers, on October 4, 1958, threatened a strike against Eastern. On the same day Eastern obtained a temporary restraining order enjoining the threatened strike by ALPA. In support of the Motion for a Temporary Restraining Order, Eastern alleged as follows:

"Said strike or work stoppage will be unlawful as a violation of the Railway Labor Act, 45 U.S.C. 151, *et seq.* in that it is called for the stated purpose of forcing the plaintiff to negotiate with defendants concerning the job qualifications, rules and working conditions of certain employees of plaintiff whose certified bargaining representative is the Flight Engineers' International Association. Said strike or work stoppage is, therefore, an illegal attempt to force the plaintiff to violate those provisions of the Railway Labor Act which require the plaintiff to bargain with the certified representative of its employees concerning their rates of pay, rules and working conditions." See Compl. para. 11.

[4] This agreement was held "in escrow" by the National Mediation Board until its contents were made known to EAL Chapter in April, 1962. It is annexed to the Complaint as Exhibit 1.

[5] The third pilot was not a qualified flight engineer and performed no flight engineer functions. For Eastern's own evaluation that he did not even perform any additional pilot functions, see *infra* p. 12, n. 15.

reached with EAL Chapter. Of crucial importance to the instant case is Section XIX H of that agreement, the so-called "scope clause," whereby Eastern agreed to assign a flight engineer from the EAL Chapter seniority list as a crew member on certain aircraft. In that Section Eastern further agreed that it would:

> "not enter into any collective bargaining agreement, with any other organization or association, covering employees who perform the flight engineering function so long as the certification of the Association as bargaining representative for such employees remains in effect:"[6]

This agreement between EAL Chapter and Eastern did not require any pilot qualifications for flight engineers.[7] As a

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[6] Section XIX H provides *in toto* that: "A Flight Engineer, who is included on the seniority list provided for and covered by this agreement, shall be assigned to, and serve at the Flight Engineer station on all flights, without regard to the type of equipment used and operated, in all instances when a cockpit flight crew member in excess of two is assigned to perform the flight engineering function. This agreement shall be applicable to all flights and to the operation and use of all types of equipment without regard to any other name or description by which the flight engineering function may be designated: Provided, however, that if the regulation of any government agency require that, in the use and operation of any specified type of equipment, all members of a minimum cockpit flight crew of three or more, on such equipment shall possess specified qualifications and/or specified licenses which are not solely incident or necessary to the performance of the flight engineering function, the member of such minimum crew who is to, or does, perform the flight engineering function shall be selected and assigned from the seniority list, covered by this agreement, of Flight Engineers, who may possess or acquire the qualifications and/or licenses required by such regulations: Provided, further that the Company will not enter into any collective bargaining agreement, with any other organization or association, covering employees who perform the flight engineering function so long as the certification of the Association as bargaining representative for such employees remains in effect: and Provided, further that "the flight engineering function" as used herein is defined to mean that function as it is generally known." See Compl. para. 5.

[7] The pertinent qualifications Section provides only that: "Every Flight Engineer employed by the Company will be required to have a mechanics certificate, with power plant and air frame ratings

result ALPA, faced with employer action in derogation of ALPA policy requiring that all flight stations, including the flight engineer station, be manned "by a qualified pilot," instituted a strike the next day, January 1, 1959, against Eastern. This strike was settled the same day it began by the execution of a Memorandum of Understanding in which Eastern again agreed, as it had on November 12, 1958, that an unneeded third pilot would be included in the crew on all jet equipment. Thus, when the instant dispute between EAL Chapter and Eastern arose in 1961, Eastern was and had been for some time operating its jet aircraft with four-men crews, three pilots and one flight engineer.

The Instant Dispute Between EAL Chapter and Eastern

In 1961 during the contract negotiations with EAL Chapter, Eastern, in an obvious effort to bring itself into compliance with ALPA policy of an all-pilot crew, pressed for a requirement that flight engineers obtain certain pilot qualifications as a pre-condtion to serving on jet equipment. EAL Chapter resisted these "crew complement" demands both on their merits and because they had not been the subject of a Section 6 notice of intended change as required by the Railway Labor Act, 45 U.S.C. § 156.

As a result of Eastern's intransigence on the economic issues in dispute, and Eastern's refusal to settle these issue until its "crew complement" demands were met, the membership of EAL Chapter engaged in a work-stoppage against Eastern commencing on June 23, 1962.

Between June 23 and July 17, 1962, EAL Chapter and

(A & E license) or at the time of hiring he will be required to have the necessary mechanical background to obtain such certificate, and he shall be required to obtain such certificate prior to the completion of twelve months of active service as a checked out Flight Engineer with the Company. Failure to comply with the above will cause the termination of the Flight Engineers employment." See Compl. para. 5.

Eastern remained deadlocked. On July 17, Eastern submitted a written proposal to EAL Chapter withdrawing all previous offers of settlement and proposing, contrary to the recommendations of the Emergency Board which had considered the issue, that any wage increase which might be agreed to should not be applied retroactively. Eastern stated further that, unless its terms were agreed to by EAL Chapter by the next evening, these terms would be offered to the individual flight engineers who were on strike. EAL Chapter responded by submitting a counter-proposal on July 18, 1962. Eastern refused to accept this counter-proposal, and proceeded to advise the individual flight engineers that it was putting its proposal into effect. Those flight engineers who did not report for work on or before July 24, 1962 on Eastern's terms were to be replaced.[8]

Eastern Bargaining and Agreements With ALPA Respecting Flight Engineers

On July 19, 1962, Eastern presented to EAL Chapter a copy of a letter sent by Eastern to the President of ALPA in which Eastern advised it intended to use *pilots represented by ALPA* to replace those flight engineers who did not yield to the ultimatum of July 18, 1962, and return to work. The letter indicated further that the utilization of pilots to perform the jobs of the flight engineers was in implementation of and pursuant to the terms of the January 1, 1959, Memorandum of Understanding between East-

[8] The legality of Eastern's dealing with the individual flight engineers and Eastern's unilateral imposition of terms and conditions of employment which had never been the subject of a Section 6 notice were before this Court in No. 776. EAL Chapter does not, in the instant matter, rely upon these same circumstances as *per se* violations of the Act. These facts are repeated here not merely for continuity, but also because these facts, viewed in the light of the other facts which became known to Petitioner subsequent to the first action, became a part of the larger picture which shows that Eastern never intended to come to any agreement with EAL Chapter because it had already committed itself to ALPA to follow an entirely different path.

ern and ALPA.[9] The next day, July 20, 1962, unknown to EAL Chapter, Eastern and ALPA executed a "Memorandum of Agreement" which gave Eastern the right to "call back the necessary copilots for flight engineer certificate training and flight assignments." [10]

On July 23, 1962, the then Secretary of Labor, Arthur J. Goldberg, proposed a method for settling the dispute. The Secretary recommended that the parties agree to arbitrate all unresolved "economic" issues and, upon receipt of that arbitration award, complete agreement on the "crew complement" issues.[11] Eastern immediately rejected this proposal on the grounds that the Secretary's "crew complement" proposal was "still one that will not immediately *include or definitely bind the pilots.*" (Emphasis added) Eastern stated further, "we cannot accept the solution that amounts to a 'truce' . . . with no assurance of pilot acquiescence." [12] By this rejection, Eastern revealed its true intent and purpose in unequivocal terms: To disregard EAL Chapter and its bargaining rights and to reach agreement with ALPA in a manner which would make it unnecessary to deal thereafter with EAL Chapter. As already indicated, known only to Eastern and ALPA, these parties had already agreed on July 20.

EAL Chapter accepted the Secretary's proposed settle-

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[9] This letter appears in its entirety as Exhibit 4 to the Complaint herein.

[10] This "Memorandum" was not made known to Petitioner until the first week of August, 1962, at which time the August 3 and August 6 agreements with ALPA referred to below, pp. 10-11, were also made known to Petitioner. The first action, No. 776, was filed July 24, 1962. The "Memorandum" appears in the Record before the Court at p. 8 of Exhibit 6-A to the Complaint.

[11] This proposed settlement was similar to one made and accepted by Trans World Airlines and the TWA Chapter of the Flight Engineers on June 21, 1962, and to one later made and accepted by Pan American Airways and the PAA Chapter of the Flight Engineers. Eastern had theretofore indicated its approval of the TWA settlement.

[12] Eastern's rejection appears as Exhibit 8 to the Complaint herein.

ment on July 24, 1962, just hours prior to the expiration of the ultimatum served by Eastern on July 18, 1962, and agreed to return to work immediately. Eastern remained adamant and again rejected it, converting the strike into a lock-out. Thereafter, until August 6, 1962, when the Secretary of Labor was moved to declare that despite assurance by Eastern it would attempt to settle with EAL Chapter, "meetings have been held [by Eastern] only with the pilots," Eastern refused to meet with EAL Chapter. The Secretary also stated:

> "Some understandings have apparently been reached between the Company and the Pilots."
>
> • • •
>
> "I have felt throughout, and still feel, that the most equitable method of settlement of the issues in this case is one patterned after the settlement which was reached on TWA and Pan American.
>
> "Apparently the Eastern management and the Eastern pilots feel otherwise."

The "some understandings" alluded to by the Secretary were subsequently made known and available to EAL Chapter: They consist of three separate collective bargaining agreements between Eastern and ALPA with respect to matters Eastern was obligated, by the Act as well as by contract, to bargain on only with EAL Chapter. The first such agreement is the "Memorandum" of July 20, 1962. The other two were executed on August 3 and 6 respectively. By these agreements Eastern and ALPA established the rates of pay, rules and working conditions of employees performing the flight engineer functions.

The agreements of August 3 and 6 provide that anyone performing as a flight engineer will receive compensation equal to at least copilot's pay.[13] (August 3 agreement, Sec-

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[13] For reasons too obvious to be developed here, Eastern and ALPA coined the euphemism "pilot-engineer" to describe the employee represented by ALPA who would perform the flight en-

tion 6; Exhibit 6-A, p. 3). These agreements provide for the seniority rights of anyone performing as a flight engineer. (August 3 agreement, Section 4; Exh. 6-A, p. 3; August 6 agreement, Section 6; Exh. 6-A, p. 7.) These agreements guarantee against furlough while performing as a flight engineer. (August 3 agreement, Section 7; Exh. 6-A, p. 3.) These agreements provide also that disputes respecting furloughs are to be heard by the Pilots System Board of Adjustment, a grievance board established by contract between Eastern and ALPA (August 3 agreement, Section 8; Exh. 6-A, p. 4.)

These agreements reveal they are not merely limited to the purpose of providing for, and protecting the rights of, temporary strike replacements. Nor are they limited merely to the duration of the strike or to the immediate future so as to expedite rapid resumption of service. They apply to *any and all future hires.* (See August 3 agreement, Section 4; Exh. 6-A, p. 3.)

Want of Justification or Excuse For Eastern-ALPA Bargaining On Flight Engineer Matters

The functions performed by the so-called "pilot-engineer" on Eastern flights today are the same as performed by the craft or class of flight engineers represented by EAL Chapter before the strike on June 23, 1962. Flight engineers, who yielded to Eastern's ultimatum and returned to work, are today performing as they always have. In fact, the August 3 agreement recognizes the prior rights of the returning flight engineers, and extends to the pilots only secondary rights behind these flight engineers.[14] If it be

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gineer functions during and after the transition from a four- to a three-man crew. This euphemism cannot mask the facts herein that Eastern had turned over to ALPA both the job of the flight engineer to provide employment for its members, and the bargaining rights incident thereto.

[14] Section 3 of that agreement provides: "the Company shall have the right to continue operating such pure-jet flights with a four-man crew in accordance with applicable agreements existing prior to the signing of this Agreement." Compl. Exh. 6-A, p. 3.

said that the "pilot-engineer" covered by the aforesaid agreements between Eastern and ALPA is a new job, consolidating the job of the flight engineer with that of the formerly used third pilot, the answer is clear. Eastern had already plainly stated that in the four-man crew which ALPA had forced upon it, the third pilot did *nothing* that was not already being done by the two pilots on airlines which used a crew of two pilots and a flight engineer.[15] Accordingly, the "pilot" portion of "pilot-engineer" added nothing to the job that the flight engineer had been doing on the four-man crew. There is no evidence in this record whatsoever of any change in job content or any consolidation of jobs. The aforesaid agreements with ALPA cover precisely the jobs that had been performed by the striking flight engineers represented by EAL Chapter.

Eastern's Final Ultimatum to Flight Engineers

Eastern, assured by its three agreements with ALPA of filling all third-seat vacancies on the jets with pilots represented by ALPA as soon as these pilots could be qualified as flight engineers, on August 8, 1962, presented EAL Chapter with another and final ultimatum: Any and all flight engineers who now quit the strike and returned to work were still eligible for employment but on *propeller equipment only.* Those flight engineers not responding to this ultimatum on or before August 16, 1962, were to lose prior job rights on all equipment. EAL Chapter, properly regarding this as an offer to permit the flight engineers to

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Section 5 of the same agreement provides: "Co-pilots will be permitted to serve as third crew members on propeller-driven aircraft of the Company only to the extent necessary to fill these jobs." *Ibid.* Eastern also recognized the legitimate prior rights of the flight engineers in its letter to ALPA of July 19, 1962. Compl., Exh. 3, para. 3.

[15] Eastern's statement reads: "Eastern's Third Pilot on its DC-8B aircraft is assigned certain pilot duties which are performed by the Captain and Second Pilot on other types of Eastern's aircraft. The duties performed by Eastern's Third Pilot on the DC-8B are performed by the Captain and Second Pilot on National's and Delta's aircraft on the same or similar types." See Compl. para. 14.

return only on pain of loss of their right to bid in accordance with seniority on all flight engineer work including jet aircraft, rejected this final ultimatum.

On August 20, 1962, EAL Chapter filed its complaint in the District Court and moved for a preliminary injunction against Eastern and ALPA.

The District Court assumed jurisdiction *sub silentio*. Ignoring completely the balance of the complaint, the opinion of the District Court dealt with only two of the claims stated: (1) that Eastern had negotiated in bad faith because it had conditioned settlement upon merger of the unions; and (2) that a conspiracy exists between Eastern and ALPA to oust EAL Chapter. It did not reach the other claims. The District Court found nothing illegal in Eastern's and ALPA's conduct, and denied the motion.

On appeal the Court, relying primarily on the decisions of this Court in *General Committee* v. *Missouri-Kansas-Texas R.R.*, 320 U.S. 323 (1943), and *General Committee* v. *Southern Pacific*, 320 U.S. 338 (1943), affirmed the denial of injunctive relief on the threshold ground that the District Court lacked "jurisdiction to grant the relief . . . sought."

It is from this judgment of the Court of Appeals that Petitioner appeals to this Court.

REASONS FOR GRANTING THE WRIT

1. The Court Below Improperly Applied General Committee v. Missouri-Kansas-Texas R.R., 320 U.S. 323 (1943), and General Committee v. Southern Pacific, 320 U.S. 338 (1943), To The Disadvantage of Proper Enforcement of Rights Under The Railway Labor Act, And To The Disadvantage Of The Future Administration Of That Act.

At the outset a very critical fact should be noted. In ruling that the federal courts are without jurisdiction in this case because, in the view of the Court below, what is involved is a "jurisdictional" or "representation" dispute, the Court below apparently considered that the complaint

is limited to the claim that Eastern violated the Act by negotiating with ALPA on matters affecting flight engineers who had selected EAL Chapter as their collective bargaining representative. That is indeed an important aspect of the complaint but, as already shown, it is by no means the whole complaint. Wholly apart from that claim are the claims that Eastern in addition violated the Act: (1) by failing and refusing to bargain with EAL Chapter in good faith, (2) by conditioning settlement of the labor dispute upon merger of ALPA and EAL Chapter, and (3) by otherwise interfering with its employees in their right freely to select their representative for collective bargaining. None of these other claims involve what by any stretch of the facts can be characterized as "jurisdictional" or "representation" disputes. Yet, the effect of the order below is to remove from the jurisdiction of the courts not only the claim based upon the agreements between Eastern and ALPA but these other claims as well. Unquestionably, if Petitioner had limited its complaint to the claims that Eastern had refused to bargain in good faith with the certified representative, and had interfered with the selection of that representative, *M-K-T* would not defeat jurisdiction of the courts to hear these claims. No good reason appears why, when Petitioner claims in addition that Eastern compounded these violations of the Act by dealing with ALPA, the courts then lose jurisdiction over *all of the claims* stated.

The effect of the decision of the Court below is to deny forever to EAL Chapter vindication of its rights as the collective bargaining representative for flight engineers on Eastern, rights created by Congress in the Railway Labor Act and enforced by this Court in *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515 (1937), and *Texas & N.O.R. Co.* v. *Brotherhood of Railway Clerks*, 281 U.S. 548 (1930). Petitioner does not believe that this Court intended its decisions in *M-K-T* and *Southern Pacific* to be applied, as the Court below applied them, to obliterate rights of unions and obligations of employers enforceable by judicial decree. Unless the federal courts are available to Petitioner as the

forum in which to present its claims of unlawful conduct, Petitioner will have no remedy available to it under the Railway Labor Act, and patent violations of the Act will go unremedied.

A. The Complaint States Claims of Violations of the Railway Labor Act Over Which the Federal Courts Have Jurisdiction, and For Which Injunctive Relief Is Appropriate.

The acts complained of by Petitioner would, if proved, constitute clear violations of Section 2, First, of the Act (refusal to bargain in good faith and conditioning settlement upon merger); of Section 2, Third, and Section 2, Fourth (attempt to effect recognition of ALPA, to oust EAL Chapter and to coerce and interfere with the selection of a labor represenative); Section 2, Fourth, and Section 2, Ninth (bargaining with ALPA with respect to flight engineers' terms and conditions of employment).

This Court held in *Texas & N.O.R. Co.* and *Virginian Ry.* that the federal courts have jurisdiction and the obligation to enforce these positive mandates of the Act, violations of which Petitioner complains herein, so as to insure to the employees the right to select their bargaining representative without interference or coercion, and so as to insure that an employer meets its obligation under the Act to bargain in good faith and exclusively with the labor organization freely selected by the employees.

In *Texas & N.O.R. Co.*, the question presented was whether the provisions of Section 2, Third, of the Act, stating that representatives shall be selected "without interference, influence, or coercion" by the other party, were among those certain definite obligations imposed by Congress in the Act enforceable by judicial proceeding. This Court held they were. The Court found the employees were free to organize and to make a choice of their representative without interference and "pressure" of a company union organized and maintained by the employer; and that it was the duty of the courts to enforce by injunctive relief

the legal sanctions against interference with this statutory freedom and right.

In *Virginian Ry.*, the issue before the Court was the correctness of a decree of the lower court directing (1) that the Company "treat with" the complaining certified union and to exert every reasonable effort to make and maintain agreements; and (2) that the Company be restrained from "entering into any contract . . . concerning rules, rates of pay or working conditions affecting its Mechanical Department employees," except with the complaining union. The Court affirmed the issuance of this decree. It held:

> ". . . The obligation imposed on the employer by section 2, Ninth (45 U.S.C.A. § 152, subd. 9, to treat with the true representative of the employees as designated by the Mediation Board, when read in the light of the declared purposes of the act, and of the provisions of section 2, Third and Fourth (45 U.S.C.A. § 152, subds. 3, 4), giving to the employees the right to organize and bargain collectively through the representative of their own selection, is exclusive. It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other . . ." 300 U.S. at 548.

The complaint herein raises precisely the claims stated in *Texas & N.O.R. Co.* and *Virginian Ry.* This Court should grant review in this cause in order to preserve the proper application of those decisions, and to insure the proper enforcement of rights arising under the Railway Labor Act.

B. The Complaint Does Not State Any Controversy Which Within M-K-T and Southern Pacific Would Defeat Jurisdiction of the Federal Courts Over Claims Arising Under the Railway Labor Act.

The Court below, citing this Court's decisions in *M-K-T* and *Southern Pacific* in support of its conclusion, held in denying jurisdiction of the courts to hear Petitioner's claims that (Appendix A, *infra* p. 3a):

> "But the courts may act only where it is clear that the duty to bargain exists. Where there is doubt as to

representation and where there are rival jurisdictional claims, those doubts are to be resolved and the claims are to be vindicated or rejected not by the courts but by the administrative and other processes provided by the Act."

Petitioner submits that while this is a fair construction of what this Court held in *M-K-T* and *Southern Pacific*, the Court below misapplied those two cases here by extending their holdings beyond the peculiar facts presented in them. Upon careful review of those cases, it is patent that the instant case presents entirely different claims than were presented there, claims in fact which this Court found *were not* presented in *M-K-T* or *Southern Pacific*.

M-K-T was an action by the Engineers' union to have declared unlawful a certain mediation agreement between the Firemen's union and the carrier, in so far as that agreement affected calling into service employees, who performed *both* fireman and engineer work, for emergency work as engineers. The record showed that the job of fireman had been used at all material times as a "stepping stone" to the higher paying job of engineer; that all engineers were former firemen, retained seniority as firemen even though working as an engineer, and when there were not enough jobs as engineers, the engineers moved back down to "firing" thus displacing firemen with lower seniority.[16] In short, depending upon the work available, there was constant movement by employees skilled as both a fireman and engineer into and out of either craft. Prior to the execution of the disputed mediation agreement, both unions had agreements which regulated this movement of employees between occupational crafts; and an arrangement between the unions had been developed for settling disputes between them concerning this movement. Finally, however, this agreement was cancelled and each union went its separate

[16] See 320 U.S. 323, 325, 326 nn. 1 and 2. See also Brief of Respondent (Firemen), pp. 2-8; 18-19, for a more thorough account of the overlapping of interests between the two crafts.

way in an effort to secure emergency work for its own members.

This Court, faced with these facts of continual interchange between crafts, of the employment prospects in one craft inextricably bound to the employment vicissitudes in the other, held that the case:

> "... involves a jurisdictional dispute—an asserted overlapping of the interests of two crafts. It necessitates a determination of the point where the authority of one craft ends and the other begins or of the zones where they have joint authority." 320 U.S. at 334-335.

This Court went on to conclude further that *Virginian Ry.* and *Texas & N.O.R. Co.* were not applicable because those cases involved enforcement of "statutory commands which were explicit and unequivocal," which were not present owing to the overlapping of interests alluded to. 320 U.S. at 335.

The use by the Court of "jurisdictional" to describe the controversy between the Engineers' union and the Firemen's union in the *M-K-T* context was reasonable. In labor parlance, "jurisdictional" dispute had come to be an expression of art, describing those controversies in which the question raised is which of two groups of workers each in a separate bargaining unit shall have the right, or will be permitted, to perform certain work. Work assignment is at issue.[17] If union A is successful in obtaining rights with respect to the assignment of the disputed work, it will be entitled to displace the members of union B performing the work. In *M-K-T*, prior to the execution of the disputed mediation agreement between the firemen and the carrier, the engineers had a preference to perform the emergency

[17] In this sense, a "jurisdictional" dispute is distinguishable from a "representation" dispute which is essentially a rivalry for members, a dispute between two unions over the right to act as the collective bargaining representative for a determinative group of workers. See generally Note, *The NLRB As Arbiter of Work-Assignment Disputes Under 10 (k)*, 50 Geo. L. J. 121, 124 (1961); Heidenreich, *Jurisdictional Disputes and the Labor Management Relations Act of 1947*, 45 Marq. L. Rev. 143, 148, 149 (1961).

work at issue. By virtue of the mediation agreement, the firemen won from the carrier a conflicting preference to perform the emergency service. The controversy was clearly one of work assignment, or a "jurisdictional" dispute.[18]

The instant case presents an entirely different issue. The fact that two unions are involved does not, of itself, convert the issue into a "jurisdictional" dispute. Here there is no question of work assignment; no question as to whether the flight engineer assignments on Eastern's aircraft are to be performed by one group of employees, constituting a separate craft or class, as against an entirely different group of employees in another craft or class. For again we must return to the fact noted above, *supra* pp. 8, 11, that Eastern was not only willing to permit the flight engineers to continue to perform the flight engineer assignment, if they would quit the strike and return to work under the challenged conditions, but in fact some such flight engineers are so performing and have, by Eastern's own admission, a prior right to those jobs over all other employees including pilots.

Nor is there any overlapping of interests between flight engineers and pilots in the sense that there was between the firemen and engineers in *M-K-T*. There is no interchange of work between flight engineers and pilots on Eastern, and no comparable movement of employees between crafts. They are separately trained to perform distinct functions. A pilot is not trained, or "checked out" under procedures

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[18] This Court indicated in precise terms in *M-K-T* that it was not faced with a "representation" dispute. "The Engineers and the Firemen are the collective bargaining agents for their respective crafts and are acknowledged as such. Their authority so to act is not challenged." 320 U.S. at 333-334. This statement would appear to be bottomed on the claim of the Firemen that:

> "Here there has been no interference with the designation of petitioner as the representative of the engineers' craft. There has been no interference by either the M-K-T Railroad or this respondent with petitioner's performance of its obligations as the representative of the engineers' craft." Brief for Respondent, p. 30.

followed by the Federal Aviation Agency, to fly as a flight engineer. If there is insufficient work as a pilot, he "bumps" a *pilot* junior to him in *pilot* seniority and serves as a co-pilot; he does not "bump" a flight engineer because he has no flight engineer seniority. A flight engineer on Eastern, on the other hand, cannot fly as a pilot; he is not trained or "checked out" to do so. The job of flight engineering is a career in and of itself. It is not used as a "stepping stone" to employment as a pilot.

This Court held in *M-K-T* it was not faced on the facts therein with the question whether employees shall have the right to organize and bargain collectively through a representative of their own choosing, nor was it faced with the question of the right of that representative to insist that the carrier deal exclusively and in good faith with it. *Per contra* these questions are presented here. Petitioner asserts the right of its members to organize and bargain collectively without interference or coercion from Eastern or ALPA. Petitioner asserts the rights of the majority of the craft or class of flight engineers to be represented by it as the duly selected and certified collective bargaining representative over matters affecting flight engineers. Petitioner also asserts the right to insist that Eastern bargain in good faith with a *bona fide* intent to "make and maintain agreements" as commanded by Section 2, First, of the Act. These basic rights have been ignored and violated by Eastern.[19]

C. Application of M-K-T and Southern Pacific Here Would Leave Petitioner Without Any Remedy Under the Railway Labor Act and Would Result in an Obliteration of Rights Created By Congress.

[19] The decision in *Southern Pacific* is no more apposite than *M-K-T*. In that case, the Engineers had challenged the legality of another provision of the same disputed mediation agreement considered in *M-K-T*, which extended to the Firemen the authority to handle certain individual grievances of engineers. This Court found that what was involved was a "dispute like the one at issue" in *M-K-T*. 320 U.S. at 343. For all of the reasons aforestated which distinguish *M-K-T* from the instant case, so also is *Southern Pacific* not applicable here.

Petitioner has reviewed immediately above those reasons why *M-K-T* and *Southern Pacific* are inapposite to this case. This Court could not have intended those cases to be controlling in a totally different factual situation, or to have intended to refer disputes of the character presented here to any other forum than the Courts. This conclusion is confirmed by the fact that the effect of the decision of the Court below is to leave Petitioner *without any remedy whatsoever* under the Railway Labor Act, and to cause an obliteration of rights created therein by Congress which this Court in *Switchmen's Union of America* v. *National Mediation Board*, 320 U.S. 297 (1937), *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1951), and in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), held it would not countenance.

Under Title II of the Railway Labor Act, 45 U.S.C. §§ 181-188, that part which pertains to air transportation, there are only two possible forums available, aside from the courts, before which Petitioner might present claims arising out of the labor dispute alleged: the National Mediation Board (§ 181) or an appropriate board of adjustment (§ 184).[20] But, neither of these forums is in fact available.

Regardless of how the instant dispute is styled, the National Mediation Board, the first of these two possible forums, is powerless to determine Petitioner's claims of violations of the Railway Labor Act. Board jurisdiction, if such existed, would have to be predicated on the Congressional commands of Section 2, Ninth.[21] However, under this

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[20] A third possible forum, the National Air Transport Adjustment Board, which the National Mediation Board is empowered to establish under § 185, has to date not been set up. As will be seen, pp. 24-25, this is of critical importance.

[21] Arguably, Board jurisdiction to act in the instant case might exist under Section 5 of the Act also. But, upon analysis, this jurisdiction too is lacking. The Board lacks authority to hear under Section 5 complaints which raise what are essentially unfair labor practices, or to issue cease and desist orders against what would, under the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.*, be clear violations by Eastern and ALPA of their respective obligations. See §§ 8(a)(1)-(5) and 10, 29 U.S.C. §§ 158

Section of the Act the Board is empowered to act only incident to its authority to determine by election or other appropriate means which of the competing unions is the representative of the craft or class. Moreover, the Board will not adjudicate under this Section "jurisdictional" disputes except as such disputes may be said to be ancillary to the Board's authority to determine a "representation" dispute. If no "representation" dispute may properly be claimed to exist, the Board will refuse to adjudicate the "jurisdictional" dispute.[22]

In the instant case, no "representation" dispute exists: Petitioner does not dispute the authority of ALPA to represent the craft or class of pilots; and neither Eastern nor ALPA question that Petitioner is the duly certified representative for flight engineers.[23] It necessarily follows that here the Board, if it were presented with the instant dispute, would disclaim power to act, just as it did in the *Trainmen* case.[24]

(a)(1)-(5) and 160, under which the Labor Board has authority to determine and remedy unlawful labor practices. For whether this Labor Board jurisdiction preempts judicial remedies *compare San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959), *with Local 174, Teamsters Union* v. *Lucas Flour*, 369 U.S. 95 (1962), and *Smith* v. *Evening News Ass'n.*, 371 U.S. 195 (1962). See generally Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 Harv. L. Rev. 529 (1963).

[22] The Board's lack of authority under Section 2, Ninth, over "jurisdictional" disputes absent a "representation" dispute was upheld in *Brotherhood of Railroad Trainmen* v. *National Mediation Board*, 135 F.2d 780 (D.C. Cir. 1943), an action involving an unsuccessful effort by the Trainmen to have the Board decided a "jurisdictional" dispute where no "representation" dispute existed.

[23] To date, ALPA has not filed an application under Section 2, Ninth of the Act with the National Mediation Board alleging a representation dispute exists between the pilots and the flight engineers, nor has it sought a representation election among both crafts. This route, followed by ALPA in other cases involving other airlines, ALPA has not seen fit to follow here.

[24] More recently, the Board has reaffirmed its want of jurisdiction over disputes of the character presented here. In the Matter of *Representation of Employees of the Great Northern*

Furthermore, Petitioner would have nothing to gain by invoking Board jurisdiction, assuming such existed. The best Petitioner could gain from the Board under its limited authority to act in this case would be reconfirmation of its certificate as the bargaining representative for flight engineers; there could be no assurances the conduct of Eastern and ALPA would not be continued. The only other result from Petitioner's submission of this dispute to the Board would be decertification. Certainly, Congress cannot be presumed to have intended this one-way, pre-determined result from resort to the Mediation Board. Yet, that is the effect of a failure by the courts to assume jurisdiction over the complaint of Petitioner.

Nor is the adjustment board procedure under 45 U.S.C. § 184, either appropriate or available to resolve the claims presented by Petitioner. An adjustment board, created by contract between a union and an employer, has primary jurisdiction over only "minor disputes" which arise out of claims of contract violations, not statutory violations, and involve grievances, or the interpretation or application of the collective bargaining agreement. See *Brotherhood of Railroad Trainmen* v. *Chicago R. & Ind. R.R.*, 353 U.S. 30 (1957). The complaint of Petitioner in the instant case does not involve a grievance or any issue of interpretation of an ambiguous agreement, so as to render adjustment board jurisdiction appropriate. The parties do not disagree on the *meaning* or *interpretation* of any agreement. What is disputed here is the *validity* of the agreements between Eastern and ALPA, the *legality* of the course of action embarked

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Railway, 3 Determination of Craft or Class 97 (N.M.B. 1958), the Brotherhood of Railway Clerks made application to the Board for resolution of a dispute with the Order of Railroad Telegraphers involving certain work assignments. The Board refused to assume jurisdiction, stating:

> "Obviously the present dispute is one of jurisdiction between the two organizations, and not a representation dispute as contemplated by Section 2, Ninth, of the Railway Labor Act. A jurisdictional dispute of this nature should be resolved through the procedures established by the organizations themselves to adjust such controversies." 3 Determinations at 98.

upon by Eastern in furtherance of those agreements, and Eastern's refusal to bargain in good faith.

Moreover, assuming *arguendo* the matter in dispute here may be fairly described as one within the province of a board of adjustment, the difficulty remains this procedure is bilateral only, between EAL Chapter and Eastern in accordance with their contractual agreement establishing a Flight Engineer System Board of Adjustment. ALPA is not, and cannot be made, a party to this agreement. Again, as is true of resort to the Mediation Board under Section 2, Ninth, an effective disposition of the matter in dispute is not possible.

It was, of course, this access to adjustment board procedures under Title I of the Railway Labor Act, that part affecting rail transportation, which moved this Court in *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561 (1945), and *Slocum* v. *Delaware, Lackawanna & Western Railroad Co.*, 339 U.S. 239 (1950), to declare that courts, both federal and state, should in their equitable discretion refuse to adjudicate "jurisdictional"[25] disputes, such disputes being within the special competence and expertise of *national* adjustment boards.[26] However, as already noted, *supra* p. 21,

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[25] In both *Pitney* and *Slocum*, differently than in the instant cause, it could properly be claimed that the matter in dispute was "jurisdictional" between two unions, and consequently within the competence of the adjustment board, because the competing unions each claimed the right to do certain work by virtue of contracts already negotiated with the railroad, each of which contained ambiguous language supporting the respective claims. See also *M-K-T- R.R.* v. *Randolph*, 164 F.2d 4 (8th Cir. 1947), *cert. denied*, 334 U.S. 818 (1948). Petitioner's claims herein do not involve any disputed interpretation or application of Eastern-ALPA agreements, but rather their execution and validity *per se*. These latter claims the courts are peculiarly competent to determine.

[26] In *Slocum* this court noted (339 U.S. at 242-243) that one of the reasons, which motivated in 1934 amendment of the original Railway Labor Act so as to establish by fiat a national board of adjustment, was that the machinery of the adjustment boards established by voluntary agreement between the carriers and the unions, the same machinery which exists today as the only alternative under the air part of the Act, had "proved unsatisfactory."

n. 20, no comparable national adjustment board has been established for the airline industry before which all parties, including ALPA, may be compelled to appear, so as to make such adjudications possible.[27]

Under the foregoing circumstances, wherein Petitioner is without any adequate remedy under the Railway Labor Act, either administrative or contractual, this Court should grant review as this Court did in *Howard* and in *Leedom* v. *Kyne*, in order to insure against an obliteration of Congressionally created rights.

II. The Decision Of The Court Below Conflicts With The Decision Of This Court in Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1951), And With Decisions Of Other Courts of Appeals.

This Court has already had occasion to deal with an attempted appropriation of jobs under guise of a merger of job classifications in a context of derogation of representation rights like that in the instant case, has affirmed federal courts jurisdiction, and has adjudicated the merits of the claims stated. In a series of cases culminating with this Court's decision in *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1951), the federal courts refused to permit an agreement between the railroad and the Trainmen to be effective to the extent that it was an "attempted predatory appropriation" (343 U.S. at 772) of the jobs of porters, represented by another union, without their acquies-

[27] Under the rail transportation part of the Act as amended in 1934, which establishes a National Railroad Adjustment Board, techniques are available for bringing both unions which may be "involved" before the national Board and whereby a *tripartite* dispute involving two unions and an employer may be determined with finality. See, *e.g.*, *Brotherhood of Railroad Trainmen* v. *Swan*, 214 F.2d 56 (7th Cir. 1954); *M-K-T R.R.* v. *Brotherhood of Railway Clerks*, 188 F.2d 302 (7th Cir. 1951). *Cf. Order of Railroad Telegraphers* v. *New Orleans, T & M. Ry.*, 229 F.2d 59 (8th Cir.), *cert. denied*, 350 U.S. 997 (1956). *But see Whitehouse* v. *Illinois Central R.R.*, 349 U.S. 366 (1955). See generally Comment, *Work Assignment Disputes Under the Railway Labor Act*, 27 U. Chi. L. Rev. 388 (1960).

cence. On the question of the jurisdiction of the courts, this Court, after noting that the Court of Appeals had reversed the trial court's holding that the complaint raised questions "which Congress by the Railway Labor Act had made subject to the exclusive jurisdiction of the National Mediation Board and the National Railroad Adjustment Board," affirmed the judgment of the Court of Appeals sustaining jurisdiction, and held:

> "Here . . . colored workers must look to a judicial remedy to prevent the sacrifice or obliteration of their rights under the Act. For no adequate administrative remedy can be afforded by the National Railroad Adjustment or Mediation Board. The claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board under our holding in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239. This dispute involves the *validity* of the contract, not its meaning." (Emphasis added.) 343 U.S. at 774.

In subsequent litigation to implement this Court's decision, the Court of Appeals in *Howard* v. *St. Louis-San Francisco Railway*, 215 F.2d 690 (8th Cir. 1954), read this Court's decision as prohibiting the consolidation of the two crafts involved unless and until all porters were agreeable to such consolidation.[28]

The decision of the Court below that courts are without jurisdiction over the claims stated in the complaint of Peti-

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[28] The final order of the District Court left standing by the courts provided in pertinent part that:

> " 'The Brotherhood of Railroad Trainmen and the St. Louis-San Francisco Railway Company be and they are hereby permanently restrained and enjoined, jointly and severally, from using the agreement of March 7, 1946, and any other discriminatory bargaining device to oust plaintiff and those of his class similarly situated from their jobs on said railroad as train porters.' " 215 F.2d at 692.

Contrary to the facts herein, the porters in *Howard* were seeking consolidation with the Trainmen. It was this voluntarism which was recognized by the Supreme Court in *Howard*; it is this voluntarism which has been ignored by Eastern and ALPA in their attempt to impose another collective bargaining representative upon the flight engineers against their consent.

tioner is also in conflict with judgments of the Courts of Appeals for the Sixth, Fifth and Ninth Circuits, that courts do have jurisdiction to hear and determine the *validity* of collective bargaining agreements when the claim is asserted, as herein, that a carrier has violated the Railway Labor Act by negotiating and agreeing with one union on terms and conditions of employment of employees who have freely chosen another union to be their collective bargaining representative.

The Court of Appeals for the Sixth Circuit in *Brotherhood of Railroad Trainmen* v. *Smith*, 251 F.2d 282, *cert. denied*, 356 U.S. 937 (1958), enjoined the giving effect to the Trainmen's union shop agreement where that agreement would have cut off the seniority rights of employees under another union's agreement, and would have secured the discharge of these employees for non-compliance with the Trainmen's agreement. With respect to the defense raised that the Court was without jurisdiction because a "jurisdictional" dispute was involved, the Court held:

> "Here there is no 'asserted overlapping of the interests of two crafts.' . . . BRT and ORC are not asserting any claim to jurisdiction over the same jobs or working positions, nor is there the slightest dispute as to the organization representing the employees concerned. The question posed is whether . . . action can be taken cutting off seniority rights of employees in a different craft or class covered by a separate bargaining agreement and securing their discharge as to both types of employment. The administrative boards set up under the Act have no jurisdiction to determine such a question." 251 F.2d at 286.[29]

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[29] The jurisdiction of the Court of Appeals in *Smith* was placed in issue by the Trainmen's union which argued against jurisdiction. Brief for Appellant, pp. 3-12. Smith *et al.* argued in favor of the Court's jurisdiction. Brief for Appellees, pp. 5-14. On petition to this Court, the union continued to press the want of jurisdiction of the courts, and in favor of the jurisdiction of the National Railroad Adjustment Board. In fact, this was the first "Question Presented." Petition pp. 7-10. In their Brief in Opposition, Smith *et al.* argued for the Court's jurisdiction. Brief pp. 4-7. The union's petition for certiorari was denied.

The decision below also conflicts with the holding of the Court of Appeals for the Fifth Circuit in *Order of Railway Conductors* v. *Switchmen's Union*, 269 F.2d 726, *cert denied*, 361 U.S. 899 (1959). The question in that case was whether an agreement between the railroad and the Switchmen's Union for yard work was invalid because no notice had been given to two other unions representing employees who were generally roadmen but who also performed yard work. The Court, after assuming jurisdiction, found the disputed agreement lawful; it stated:

> "Of course, the craft or class represented is to be determined on functional and operational lines, not by the normal activity of the members of a labor union some of whose members may do some or all of the work in question. This is graphically illustrated by the cases arising under the 1954 Union Shop Amendments, Section 2-Eleventh, 45 U.S.C.A. § 152-Eleventh, as to which both the Ninth and Sixth Circuits have held that a union whose members perform work of another craft for which another union has been certificated, cannot legally negotiate with the railroad for its own members. And any such contract, if made, is illegal and unenforceable. *Brotherhood of Railroad Trainmen* v. *Smith*, 6 Cir., 1958, 251 F.2d 282, certiorari denied 356 U.S. 937, 78 S. Ct. 778, 2 L. Ed. 2d 812 (trainmen, members of BRT, doing conductor work and having seniority of a conductor); *Switchmen's Union of North America* v. *Southern Pacific Co.*, 9 Cir., 1958, 253 F.2d 81 (trainmen, members of BRT, doing yard work may be affected only by contract with SUNA, the yardmen's certified bargaining agent)." 269 F.2d at 731.[30]

As for the critical threshold question of its jurisdiction, the Court had found:

> "All are in agreement, with which we concur, that the case poses a genuine issue as to validity, not interpreta-

[30] Procedurally, *Order of Railway Conductors* would be on all fours with the instant case if ALPA had sued to adjudicate the legality of the application of the Flight Engineers agreement to those pilots, still represented by ALPA for certain purposes, who had performed as pilots but were now functioning as flight engineers.

tion, so that . . . it is one for judicial consideration." 269 F.2d at 729.[31]

Accord, Switchmen's Union v. *Southern Pacific Co.*, 253 F.2d 81 (9th Cir.), *cert denied*, 358 U.S. 818 (1958).[32] *Cf. Railroad Yardmasters* v. *Pennsylvania R.R.*, 224 F.2d 226 (3rd Cir. 1955).

Division 14, Order of R.R. Telegraphers v. *Leighty*, 298 F. 2d 17 (4th Cir.), *cert. denied*, 369 U.S. 885 (1962); the only Court of Appeals decision relied upon by the Court below herein, involved an intra-union dispute between a local and its parent organization over the latter's authority to execute an agreement with a railroad for integration of seniority districts, which agreement adversely affected the relative seniority standing of members of the local. The District Court had determined it lacked jurisdiction, the dispute being one within the jurisdiction of the National Railroad Adjustment Board. The Court of Appeals affirmed on the ground the dispute was within the jurisdiction of the National Mediation Board. On petition to the Supreme Court, while the question of the court's jurisdiction was presented, primary reliance was placed upon, as a question of first impression, the issue of the applicability of the Labor Management Reporting and Disclosure Act of 1959 to employees under the Railway Labor Act.[33]

This Court should grant review in this case in order to reconcile these conflicting decisions on the critical question of the jurisdiction of the federal courts to hear claims arising under the Railway Labor Act.

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[31] On brief to the Court of Appeals, both unions and the railroad argued the court had jurisdiction to decide the merits of the complaint and cross-complaint. See Brief for Appellants, pp. 14-19; Brief for Appellees (Switchmen's), pp. 6-8; Brief for Appellee (Railroad), pp. 3-4. This issue was not presented on petition to the Supreme Court.

[32] The Court of Appeals in that case assumed jurisdiction *sub silentio*. The issue of the Court's jurisdiction was not presented on petition to the Supreme Court.

[33] See Petition in No. 838, 1961 Term, and the Brief in Opposition.

III. The Question Presented Herein Of The Jurisdiction Of The Courts To Adjudicate Substantive Rights Is Also Stated In Cases Already Pending Before This Court.

This Court should grant review in this case in order to insure uniform application of National Labor Policy respecting judicial enforcement of substantive claims brought against employers in controversies which superficially involve so-called "jurisdictional" disputes between two unions.

There are presently pending before this Court two cases, *Local Lodge No. 1836, IAM* v. *Local No. 1505, IBEW*, No. 419, 1962 Term, and *Carey* v. *Westinghouse Electric Corp.*, No. 485, 1962 Term, in each of which the "Question Presented" is essentially the same as that raised in the instant Petition: Namely, does the statutorily created administrative agency concerned with labor disputes have exclusive jurisdiction over a controversy between a union and an employer which arises out of a claim that the union is entitled to have its collective bargaining agreement applied to the work assigned to another union, or do the courts instead have jurisdiction to adjudicate the substantive claims stated against the employer? This Court has granted certiorari in both *Local Lodge No. 1836.*, 31 U.S.L. Week 3171 (U.S. Nov. 19 1962),[34] and *Carey*, 31 U.S.L. Week —(U.S. April 1, 1963).

Local Lodge No. 1836 involves an effort by the Machinists union to enforce in the federal courts under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, an agreement to arbitrate, the question to be submitted to arbitration being whether the company violated its agreement with the Machinists union by assigning certain work to employees represented by the Brotherhood of Electrical

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[34] On February 1, 1963, a motion to vacate was filed by the Petitioner in *Local Lodge No. 1836* on the ground that a settlement had been reached. This motion was granted, 31 U.S.L. Week 3297 (U.S. March 18, 1963), while this Petition was being prepared.

Workers. The District Court ordered the company to arbitrate. The Court of Appeals for the First Circuit reversed on the ground that the National Labor Relations Board has exclusive jurisdiction to resolve the "jurisdictional" dispute between the two competing unions.

In *Carey*, the International Union of Electrical Workers had filed a grievance protesting the company's refusal to apply the provisions of its agreement with the union to the performance of certain work. The union contended that the work in question was identical to that regularly performed by employees in the union's bargaining unit. The union contended further the refusal by the company to apply the agreement to the performance of this work was a violation of the agreement. The company refused to arbitrate this grievance on the ground that the question raised by the grievance was a "jurisdictional" dispute and thus within the exclusive jurisdiction of the National Labor Relations Board. On appeal to the New York State Court of Appeals the company's position was sustained.[35]

In both *Local Lodge No. 1836* and *Carey* the complaining unions argue in their respective petitions, as does Petitioner herein, that court jurisdiction over the controversy is not removed because superficially it appears a "jurisdictional" dispute between two competing unions is presented. In both *Local Lodge No. 1836* and *Carey*, as here, the unions show that the labor board to which the courts deferred does not in fact have jurisdiction to determine the controversy. The clear line of demarcation between enforcement of substantive rights and "jurisdictional" or "representation" disputes is drawn in all cases.[36]

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[35] The fact that in both *Local Lodge No. 1836* and *Carey* the union seeks enforcement of a contract, whereas here Petitioner bases its claim on its statutory right as the certified bargaining representative, is a distinction without a difference. In all three cases, the rights asserted are those which arise out of and under federal law and federal law governs, the Labor Management Relations Act in the former two and the Railway Labor Act here.

[36] The main thrust of the case for the unions in *Local Lodge No. 1836* and *Carey* is to demonstrate their cases involve enforcement

Petitioner believes the decision below significantly limits the enforcement of statutory rights under the Railway Labor Act, just as the decisions of the lower courts in *Local Lodge No. 1836* and *Carey* impair the enforceability of agreements to arbitrate under Section 301 of the Labor Management Relations Act. Under such circumstances, it would be anomalous to leave Petitioner to the other questionable processes of the law, while at the same time review has been granted in analogous cases assuring the unions the opportunity to show why only the courts have jurisdiction over the claims stated, and why the other processes of law are not appropriate.

IV. If The Court Below Has Properly Applied M-K-T And Southern Pacific To The Facts Of This Case, Petitioner Urges This Court To Reconsider Those Cases On The Ground That They Effectively Bar The Vindication Of Rights Guaranteed Under The Railway Labor Act.

If, contrary to what has been already argued, *supra*, pp. 13-20, the Court of Appeals did not erroneously apply *M-K-T* and *Southern Pacific* to the facts of this case, and in so doing did not fail to follow the clear precedents of this Court in *Texas & N.O.R. Co.*, *Virginian Ry.* and *Howard*, then Petitioner respectfully requests that *M-K-T* and *Southern Pacific* be given reconsideration.

Petitioner submits such reconsideration is warranted for, to do otherwise and sustain the application of the principle of want of jurisdiction enunciated by those two cases, is to leave Petitioner remediless. Under the Railway Labor Act the National Mediation Board has no authority to grant Petitioner the relief requested. The bipartisan Flight En-

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of rights distinct and different from those asserted in cases like *N.L.R.B.* v. *Radio & Television Engineers*, 364 U.S. 573 (1961), over which the Labor Board has clear exclusive jurisdiction. Similarly, in the instant case, Petitioner has demonstrated the difference between this case and *M-K-T* wherein the Mediation Board did have authority to determine the controversy.

gineer System Board of Adjustment is neither appropriate nor available to adjudicate what is essentially a tripartite controversy. Finally, the National Mediation Board has not yet seen fit to establish, as it is empowered to do under the air part of the Act, a National Air Transportation Adjustment Board which, arguably, might be competent to determine some aspects of this controversy. Only the federal courts remain to vindicate the claims asserted by Petitioner.

In these premises, unless *M-K-T* and *Southern Pacific* are reconsidered in the limited context presented in this Petition, there will result a sacrifice and obliteration of rights guaranteed by the Railway Labor Act which this Court in *Switchmen's Union of America* v. *National Mediation Board*, 320 U.S. 297 (1937), *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1951), and *Leedom* v. *Kyne*, 358 U.S. 184 (1958), held would not be allowed to result.

If *M-K-T* means what the Court below says it does, it now lies within the power of any air carrier to turn its back upon a certified union and enter into an agreement with another union—even one of its own creation—covering the terms and conditions of employment of the employees who have selected the certified union as their representative. The heart is torn out of the Railway Labor Act, and there is nothing anyone can do about it; for the federal courts are without jurisdiction to remedy the violation, and there is no other tribunal established under the Railway Labor Act that has jurisdiction. Congress could not have intended such a result and this Court cannot countenance it.

CONCLUSION

For the reasons set forth herein, this Petition should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 408—September Term, 1961
(Argued September 20, 1962 Decided January 4, 1963)

Docket No. 27793

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, EAL CHAPTER,

Appellant,

v.

EASTERN AIR LINES, INC. and AIR LINE PILOTS ASSOCIATION,

Appellees.

Before:

MOORE, HAYES and MARSHALL, *Circuit Judges.*

Appeal from the denial of a temporary injunction by the District Court for the Southern District of New York, R. H. Levet, Judge.

Affirmed.

HAYS, *Circuit Judge:*

The Flight Engineers' International Association appeals from the denial of its application for a temporary injunction. We affirm the district court's determination.

This case presents one phase of the controversy over the "crew complement" issue, an issue which has concerned the courts in a number of its aspects. (See, e.g., *Pan American World Airways* v. *Flight Engineers Int'l Ass'n*, 306 F.2d 840 (1962); *Flight Engineers Int'l Ass'n* v. *Eastern Air Lines, Inc.*, 208 F. Supp. 182 (S.D.N.Y.),

aff'd, 307 F.2d 510 (1962). Various airlines, the flight engineers union and the air line pilots union have been involved for several years in a dispute as to the constitution of cockpit crews on jet planes. Governmental regulations require a crew of three, two of whom are qualified as pilots and one of whom holds a flight engineer's certificate. The flight engineers union has insisted that the flight engineer in the crew hold an "A and P" (airframe and powerplant) license, a condition which in practice requires the presence in the cockpit of an engineer represented by that union. The airline pilots union has been equally insistent that three qualified pilots be included in the crew. In the past the employers have solved the difficulty presented by the competing demands of the two unions by employing a crew of four. They are now determined to reduce the crew to the three required by government regulation. The defendant Eastern Air Lines has been willing either to give one of the pilots engineer's training or to give the flight engineer pilot's training. Neither of these solutions has been found acceptable by both unions.

It would serve no useful purpose to detail again the series of strikes engaged in by each of the unions over the various attempts to resolve the crew complement issue, nor the repeated interventions of the National Mediation Board, presidential emergency boards, a special commission designated by the President, the Secretary and Undersecretary of Labor and the President himself. The history is set forth by Judge Feinberg in 208 F. Supp. 182. See also *Pan American World Airways* v. *Flight Engineers Int'l Ass'n, supra.* It is sufficient to say that all such efforts have failed.

The strike of the flight engineers union which is the occasion of the present controversy began on June 23, 1962. On July 18, 1962 Eastern sent a letter to each of the striking flight engineers stating that:

> "In order to return to work it will be necessary for you to report *in person* * * * on or before July 24, 1962,

at which time you will be allowed to elect whether or not you will take the jet flight engineer training and thus be eligible for jet assignments."

Some of the flight engineers returned to work in response to the letter. Eastern recruited from among its pilots about 80 to take flight engineers training and thus to become "pilot-engineers." In connection with the latter move, Eastern negotiated a series of agreements with the pilots' union which regulated the retention by the pilots who became pilot engineers of their seniority as pilots, and provided for their compensation and other terms and conditions of their employment as pilot engineers.

The flight engineers now seek an injunction requiring defendant Eastern Air Lines to bargain exclusively with the flight engineers union with respect to the terms of employment of those hired as pilot engineers and restraining Eastern and the air line pilots union from bargaining as to those terms of employment and from giving effect to any agreements between them which concern those terms of employment.

Under the Railway Labor Act (45 U.S.C. § 151 ff.) it is the duty of the courts to enforce the statutory command to bargain collectively. *Virginan Ry.* v. *System Federation 40, Ry. Employees*, 300 U.S. 515 (1937). But the courts may act only where it is clear that the duty to bargain exists. Where there is doubt as to representation and where there are rival jurisdictional claims, those doubts are to be resolved and the claims are to be vindicated or rejected not by the courts but by the administrative and other processes provided by the Act. *General Committee* v. *Missouri-Kansas-Texas R.R.*, 320 U.S. 323 (1943); *General Committee* v. *Southern Pacific Co.*, 320 U.S. 338 (1943); *Division 14, Order of R.R. Telegraphers* v. *Leighty*, 298 F.2d 17 (4th Cir. 1962); *Flight Engineers Int'l Ass'n* v. *Trans World Airlines, Inc.*, 205 F. Supp. 137 (S.D.N.Y. 1962).

In the present case there is a dispute as to representation and there are rival claims of jurisdiction. Both unions claim

to represent the employees who are classified as "pilot-engineers." An injunction is sought to force the employer to bargain with the flight engineers union rather than the pilots union with respect to the conditions under which these "pilot-engineers" shall be employed. The pilots union urges that it is entitled to bargain for these employees.

This situation presented is almost completely analogous to the situation found in the *M-K-T* case, *supra*. There both the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen claimed the right to bargain with the employer as to the terms and conditions of employment of engineers called for emergency service. Holding "that the issues tendered by the present litigation are not justiciable" (p. 327), the Court traced the history of the Railway Labor Act and concluded that:

> "[I]t is apparent on the face of the Act that while Congress dealt with this subject comprehensively, it left the solution of only some of those problems to the courts or to administrative agencies. It entrusted large segments of this field to the voluntary processes of conciliation, mediation, and arbitration. * * * Those instruments, in addition to the available economic weapons, remain unchanged in large areas of this railway labor field. On only certain phases of this controversial subject has Congress utilized administrative or judicial machinery and invoked the compulsions of the law. Congress was dealing with a subject highly charged with emotion. Its approach has not only been slow; it has been piecemeal. Congress has been highly selective in its use of legal machinery. The delicacy of these problems has made it hesitant to go too fast or too far. The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." 320 U.S. at 332-33.

The Court added:

> "It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not to leave their solution to the courts. As we have already pointed out, Congress left the present problems far back in the penumbra of those few principles which

it codified. Moreover, it selected different machinery for their solution. Congress did not leave the problem of inter-union disputes untouched. It is clear from the legislative history of § 2, Ninth that it was designed not only to help free the unions from the influence, coercion and control of the carriers but also to resolve a wide range of jurisdictional disputes between unions or between groups of employees. H. Rep. No. 1944, *supra*, p. 2; S. Rep. No. 1065, 73d Cong., 2d Sess., p. 3. However wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board. If the present dispute falls within § 2, Ninth, the administrative remedy is exclusive. If a narrower view of § 2, Ninth is taken, it is difficult to believe that Congress saved some jurisdictional disputes for the Mediation Board and sent the parties into the federal courts to resolve the others. Rather the conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else it left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability.

"In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration. See H. Rep. No. 1944, 73d Cong., 2d Sess., p. 2. Courts should not rush in where Congress has not chosen to tread." 320 U.S. at 336-37 (footnote omitted)

Of a similar issue the Court said in the companion case of *General Committee* v. *Southern Pacific Co., supra*:

"It involves, that is to say, a jurisdictional controversy between two unions. It raises the question whether one collective bargaining agent or the other is the proper representative for the presentation of certain claims to the employer. It involves a determination of the point where the exclusive jurisdiction of one craft ends and where the authority of another craft begins. For the reasons stated in our opinions in the *Missouri-Kansas-Texas R. Co.* case and in *Switchmen's* case, we believe that Congress left the so-called jurisdictional controveries between unions to agencies or tribunals other than the courts." 320 U.S. at 343-44.

On the authority of these cases it is clear that the district court was without jurisdiction to grant the relief which the plaintiff sought. The doubtful claims of representation and the jurisdictional controversy are subjects upon which the Act provides for non-curial treatment. The courts must refrain from interfering in a field from which Congress has excluded them.

Affirmed.

APPENDIX B

Pertinent provisions of the Railway Labor Act referred to in the Petition are as follows:

Section 2, First:

> "First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Section 2, Third:

> "Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

Section 2, Fourth:

> "Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in perform-

ing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

Section 2, Ninth:

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to

and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

Section 201, 45 U.S.C. § 181:

"All of the provisions of sections 151-152, and 154-163 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service."

Section 204, 45 U.S.C. § 184:

"The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181-188 of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National

Board of Adjustment as hereinafter provided. Nothing in sections 151-163 and 181-188 of this title shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of sections 181-188 of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction."

Section 205, 45 U.S.C. § 185:

"When, in the judgment of the National Mediation Board, it shall be necessary to have a permanent national board of adjustment in order to provide for the prompt and orderly settlement of disputes between said carriers by air, or any of them, and its or their employees, growing out of grievances or out of the interpretation or application of agreements between said carriers by air or any of them, and any class or classes of its or their employees, covering rates of pay, rules, or working conditions, the National Mediation Board is empowered and directed, by its order duly made, published, and served, to direct the said carriers by air and such labor organizations of their employees, national in scope, as have been or may be recognized in accordance with the provisions of sections 151-163 and 181-188 of this title, to select and designate four representatives who shall constitute a board which shall be known as the "National Air Transport Adjustment Board." Two members of said National Air Transport Adjustment Board shall be selected by said carriers by air and two members by the said labor organizations of the employees, within thirty days after the date of the order of the National Mediation Board, in the manner and by the procedure prescribed by section 153 of this title for the selection and designation of members of the National Railroad Adjustment Board. The National Air Transport Adjustment Board shall meet within forty days after the date of the order of the National Mediation Board directing the selection and designation of its members and shall organize and adopt rules for conducting its proceedings, in the manner prescribed in section 153 of this title. Vacancies in membership or office shall be filled, members shall be appointed in case of failure of the carriers or of labor organizations of the employees to select and designate representa-

tives, members of the National Air Transport Adjustment Board shall be compensated, hearings shall be held, findings and awards made, stated, served, and enforced, and the number and compensation of any necessary assistants shall be determined and the compensation of such employees shall be paid, all in the same manner and to the same extent as provided with reference to the National Railroad Adjustment Board by section 153 of this title. The powers and duties prescribed and established by the provisions of section 153 of this title with reference to the National Railroad Adjustment Board and the several divisions thereof are conferred upon and shall be exercised and performed in like manner and to the same extent by the said National Air Transport Adjustment Board, not exceeding, however, the jurisdiction conferred upon said National Air Transport Adjustment Board by the provisions of sections 181-188 of this title. From and after the organization of the National Air Transport Adjustment Board, if any system, group, or regional board of adjustment established by any carrier or carriers by air and any class or classes of its or their employee is not satisfactory to either party thereto, the said party, upon ninety days' notice to the other party, may elect to come under the jurisdiction of the National Air Transport Adjustment Board."

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IN THE

Supreme Court of the United States

October Term, 1962

No. 980

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION
EAL CHAPTER, AFL-CIO,

Petitioner,

—v.—

EASTERN AIR LINES, INC. and
AIR LINE PILOTS ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT EASTERN AIR LINES IN OPPOSITION

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BRIEF FOR RESPONDENT EASTERN AIR LINES IN OPPOSITION

Opinions Below

The opinion of the court below (Pet. App. 1a-6a) is reported at 311 F.2d 745. The opinion of the District Court (Appendix, *infra*, pp. 1a-10a) is not officially reported[1] but has been reported unofficially at 51 LRRM 2105.

Jurisdiction

The judgment of the court below was entered on January 4, 1963. The petition was filed on April 3, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

[1] Petitioner erroneously cites (Pet. 1) the official report of the related decision by Judge Feinberg, discussed hereinafter.

Question Presented

Beginning in 1958, petitioner and respondent Air Line Pilots Association (ALPA) had each conducted a series of strikes against respondent Eastern Air Lines (Eastern) over what has come to be known as the "crew complement" issue. In establishing crew qualifications for the cockpits of jet airplanes, Eastern had offered the flight engineer pilot training so as to give its flight engineers security in the job while meeting in part ALPA's demand for pilot-trained men in all cockpit positions. This proposal was not acceptable to either union. Petitioner insisted that its members not be given pilot training and that the A & P (ground mechanics-type) license be continued as a qualification for the third position in the cockpit. ALPA insisted, on the other hand, that every man in the cockpit should be a pilot represented by ALPA, and that one of them should have the flight engineer's certificate required by the Federal Aviation Agency.

Almost a month after the commencement (June 23, 1962) of petitioner's latest strike over the crew complement and A & P issues, and after the procedures of the Railway Labor Act had been exhausted on those issues and an impasse had been reached, Eastern eliminated the A & P license requirement and required flight engineers to take pilot training to become "pilot engineers." Some of the strikers returned to work on these conditions.

Eastern had also offered to train and in fact trained a number of pilots for flight engineer's certificates so that they could qualify as "pilot engineers" or flight engineers and permanently replace strikers who refused to return to work. In this connection, Eastern and ALPA negotiated three agreements. Petitioner attacks the validity of these agreements on the asserted ground that they relate to flight

engineers and that Eastern was obligated to bargain exclusively with it with respect to the terms and conditions of employment of pilot engineers or flight engineers and had no right to bargain for this purpose in any way with ALPA.

In denying petitioner's motion for a preliminary injunction against the performance of these agreements, the court below held that Congress—by the Railway Labor Act—had excluded the courts from jurisdiction of "[t]he doubtful claims of representation and the jurisdictional controversy" presented by petitioner's motion. The question now sought to be presented is whether the court erred in so holding.

Statement

This is the second petition for certiorari arising out of this same crew complement dispute. The first petition was filed in the case decided by Judge Feinberg, *Flight Engineers' International Association, EAL Chapter, AFL-CIO* v. *Eastern Air Lines, Inc.*, 208 F.Supp. 182 (S.D. N.Y.), *aff'd* 307 F.2d 510 (2d Cir. 1962), and was denied on March 18, 1963 (October Term 1962, No. 776).

While in its present Statement petitioner has chosen to recite the limited certiorari questions presented in the first case (see Pet. 3, 8 fn. 8), it ignores completely Judge Feinberg's "thorough and well reasoned opinion"—upon which the Court of Appeals in that case affirmed—which sets forth a history of the crew complement dispute fundamental to an understanding of the present petition. We shall therefore refer to that opinion as well as to the opinions of both courts below (App., *infra*, 1a-10a;[2] Pet.

[2] We regret that petitioner's failure to comply with Rule 23(i), which required it to append to its petition the District Court's opinion (which it criticizes at Pet. 13, second full paragraph), has made it necessary for us to append that opinion to this brief.

App. 1a-6a) to correct inaccuracies and omissions in petitioner's Statement.

Judge Feinberg's Opinion in the First Case

In *Flight Engineers' International Association, EAL Chapter, AFL-CIO* v. *Eastern Air Lines, Inc., supra,* Judge Feinberg found, *inter alia,* that as between the petitioner and Eastern the "major dispute" procedures of the Railway Labor Act had been exhausted as to crew complement and A & P license issues; that for the preceding year and a half, efforts had been made by the National Mediation Board, a Presidential (Feinsinger) Commission, a Presidential (Kheel) Emergency Board, and various high government officials to resolve the crew complement dispute, but these efforts had failed; that beginning in early June 1962, after petitioner's latest strike notice, petitioner repeatedly rejected mediation and arbitration, even when it was proposed by the President of the United States; that the crew complement and A & P license issues were the "primary cause" of petitioner's strike of June 23, 1962; that two days after the strike began—on June 25, 1962—Eastern offered to settle all issues, including crew complement, on the basis of the just-concluded Trans World Airlines settlement but petitioner rejected the offer and stated, in effect, that it would never give up the A & P license requirement; and that after June 23, 1962 an impasse over crew complement and related issues had been reached.

Based on these findings, which are only briefly sketched above, Judge Feinberg decided that Eastern could lawfully resume operations by changing terms and conditions of employment of flight engineers relating to crew complement and A & P license; that Eastern could lawfully ask

the striking flight engineers to return to work to take pilot training on (modified Feinsinger Commission and Kheel Board) terms that had been previously offered to, and rejected by, petitioner; and, finally, that Eastern, under the circumstances in which it found itself, could train copilots represented by ALPA to take training for a flight engineer's certificate in order to replace the strikers (208 F.Supp. 182 at 185-194).

While Judge Feinberg's order denying petitioner's motion for a preliminary injunction was pending on appeal, petitioner brought this second action against Eastern and made ALPA a codefendant.

The Court of Appeals affirmed Judge Feinberg on his opinion.

The District Court Opinion in This Case

The District Court in this case found, "for the same reasons as did Judge Feinberg," that as between petitioner and Eastern "the procedures of the Act for the settlement of this dispute have been exhausted and that the parties were free to resort to self-help" (App. 8a). It also found "that Eastern has at all times bargained in good faith with [petitioner] and has not conditioned its bargaining on a merger of [petitioner] with ALPA" (App. 9a); and that the petitioner's charge of "a conspiracy" between Eastern and ALPA was "also without merit" (*Ibid.*). Petitioner's failure to append Judge Levet's opinion to the petition (see footnote, p. 3, *supra*) may be accounted for by its unwillingness to deal with these dispositive findings.

Turning to the three agreements of July 20, August 3 and 6, 1962 between Eastern and ALPA which, according to petitioner, relate to matters on which "Eastern was obligated, by the Act as well as by contract, to bargain on only

with EAL Chapter" (Pet. 10), the District Court found that: "These agreements prescribe the procedures under which pilots are to receive training in flight engineer functions and the protection they are to receive as pilots while training and serving as flight engineers" (App. 9a-10a); "These agreements are consistent and necessary to the courses of self-help which Judge Feinberg found lawful • • • I find no violation of [petitioner's] rights in the execution of these agreements" (App. 10a). Accordingly, the District Court denied petitioner's motion for a preliminary injunction on the ground that petitioner had "failed to show by clear and convincing facts that Eastern has violated its legal rights or that it has a reasonable probability of success in a final hearing in this case" (*Ibid.*).

Opinion of the Court of Appeals in This Case

The Court of Appeals observed that petitioner is in this case seeking an injunction to require Eastern "to bargain exclusively with the flight engineers union with respect to the terms of employment of those hired as pilot engineers" and to restrain Eastern and ALPA "from bargaining as to those terms of employment and from giving effect to any agreements between them which concern those terms of employment" (Pet. App. 3a). It found that this "is a dispute as to representation and there are rival claims of jurisdiction" (*Ibid.*). "Both unions claim to represent the employees who are classified as 'pilot-engineers'" (Pet. App. 3a-4a). The Court of Appeals concluded therefore that the District Court was "without jurisdiction to grant the relief" sought by petitioner (Pet. App. 6a).

With respect to the effect of the three agreements between Eastern and ALPA, the Court of Appeals took a view somewhat different from that of the District Court

(see App. 5a-6a, 9a-10a), saying that they regulated both the seniority of the pilots who became pilot engineers and also the terms and conditions of their employment as pilot engineers (Pet. App. 3a).

Under the District Court's express language, Eastern has not bargained with ALPA as to basic terms and conditions of employment of pilot engineers or flight engineers and therefore has not breached any duty to bargain with petitioner. The Court of Appeals held that there is here involved a basic jurisdictional dispute over the exclusive right of one union to represent the pilot engineers or the flight engineers. Under either construction the result reached below was correct, and there can be no basis for granting certiorari.

Reasons for Denying the Writ

The two questions posed by petitioner (Pet. 2) are bottomed on its refusal to acknowledge the correctness of the holding that this case presents "a dispute as to representation" and "rival claims of jurisdiction" (Pet. App. 3a). This precise characterization of the nature of this controversy by the court below is hardly refutable by petitioner's undocumented assertion (e.g., Pet. 11-12) that nothing has really changed in the metamorphosis from a four-man to a three-man crew, which gives rise to the "doubt as to representation" and the "rival jurisdictional claims"—subjects which Congress has entrusted not to the courts but to the "administrative and other processes provided by the Act" (Pet. App. 3a).

In so holding, the court below took a position in accord with the decisions in which this Court has carefully traced the legislative history and pattern of the Act. In the particular factual setting in which that time-tested conclusion is here challenged, there is no problem of general

importance. Nor is there a conflict of decisions. There is, in short, no occasion for further review of the denial of a preliminary injunction sought to force Eastern "to bargain with the flight engineers union rather than the pilots union with respect to the conditions under which these 'pilot-engineers' shall be employed" (Pet. App. 4a).

1. Petitioner now says that no representation dispute exists because it "does not dispute the authority of ALPA to represent the craft or class of pilots; and neither Eastern nor ALPA question that Petitioner is the duly certified representative for flight engineers" (Pet. 22). The quoted statement is correct only so long as it diverts attention from the representational and jurisdictional questions posited by the pilot-engineer position and by the dual seniority (both as pilots and flight engineers) of those pilots who replaced the strikers. Implicit in petitioner's statement is the claim that it is the employees' "true representative" (see Pet. 16) with which the employer has a clear duty to bargain, as in *Virginian Railway* v. *System Federation 40, Railway Employees*, 300 U.S. 515 (1937). But the court below, while fully acknowledging the command of *Virginian Railway* (Pet. App. 3a), found that decision inapposite where, as here, the duty to bargain and the dividing line between the representational rights of two unions have yet to be established under the Act.

Petitioner's attack on the agreements between Eastern and ALPA presupposes that petitioner, and not ALPA, has the exclusive right to bargain with Eastern with respect to the matters covered in those agreements. But their provisions relate to terms and conditions of employment of pilots, as pilots, while they are serving as pilot engineers or flight engineers. And to the extent that any of those provisions might conceivably affect flight engineer jobs,

they result from the recommendations of the Presidential (Feinsinger) Commission, and from the course of self-help found lawful by Judge Feinberg and the Court of Appeals in the first case. In short, these agreements provided the means by which Eastern was able to effectuate the replacement of strikers with pilots and they recorded conditions as they had been lawfully changed by Eastern. But even assuming, *arguendo*, that Eastern did bargain with ALPA over matters within petitioner's alleged representational or jurisdictional province, the controversy is not one for the courts, but for the National Mediation Board.

Thus, in *General Committee* v. *Missouri-Kansas-Texas R. Co.*, 320 U.S. 323 (1943), the Firemen and the Engineers, each of whom represented a separate craft or class, had a dispute over the calling of engineers for emergency service. The Engineers claimed that an agreement entered into between the Firemen and the carriers infringed upon its allegedly exclusive right to represent the engineers; it sought to have the court declare that the agreement violated the Railway Labor Act, and also prayed "that the Engineers should be declared to be the sole representative of the locomotive engineers with the exclusive right to bargain for them" (320 U.S. at 327). Thus, in a situation which the Court of Appeals correctly considered "almost completely analogous" to this one (Pet. App. 4a), this Court held "that the issues tendered by the present litigation are not justiciable" (at p. 327). Petitioner strives (Pet. 16-20) to differentiate the *M.-K.-T.* case from this one. The cases are, however, remarkably similar. Here, as in *M.-K.-T.*, the two unions involved "are the collective bargaining agents for their respective crafts and are acknowledged as such" (320 U.S. at 333). Here, as in *M.-K.-T.*, the employees involved in the dispute have dual seniority (pilot seniority —flight engineer seniority in the case of Eastern; engineer

seniority—fireman seniority in the case of *M.-K.-T.*). Here, as in *M.-K.-T.*, two unions are claiming the right to negotiate with the carrier concerning specific matters having relationship to both classes of employees; that is, it "involves a jurisdictional dispute—an asserted overlapping of the interests of two crafts. It necessitates a determination of the point where the authority of one craft ends and the other begins or of the zones where they have joint authority" (320 U.S. at 334-335). Therefore here, as in *M.-K.-T.*, the issue is for the Mediation Board, not the courts.

We refer to the full opinion in *M.-K.-T.* and in *General Committee* v. *Southern Pacific Co.*, 320 U.S. 338 (1943), and *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943). All three cases, read together, give a fully documented account of the Congressional scheme in the Railway Labor Act. And they fully support the decision below.

2. Purporting to see a "conflict" between the decision below and a number of decisions collected at pages 25 to 29 of the petition, the petitioner does not even attempt to show any area of conflict.

The first group of cases cited for this purpose (Pet. 25-26) has consistently upheld federal jurisdiction to compel fair representation of colored workers faced with invidious discrimination by labor unions purporting to represent them. But even in one of that class of cases cited by petitioner, this Court in *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 775 (1952), cautioned the district court that it

> "• • • must bear in mind that *disputed* questions of reclassification of the craft of 'train porters' are com-

mitted by the Railway Labor Act to the National Mediation Board." (Court's emphasis.)

The second group of cases is cited by petitioner (Pet. 27-29) in support of its omnibus request to this Court to "reconcile" them (Pet. 29, last paragraph). In the case cited first, *Brotherhood of Railroad Trainmen* v. *Smith*, 254 F.2d 282 (6th Cir.), *cert. denied*, 356 U.S. 937 (1958), the question posed concerned the validity of a union shop agreement under Section 2, Eleventh (a) of the Act. No disputed questions of representation were there presented. Similarly, in each of the other assertedly conflicting decisions (Pet. 28-29), the validity of the provisions of the challenged contract was not related to the merits of a representation dispute.

Proceeding in like manner, the court below found that petitioner's attack on the validity of some of the provisions of the relevant contracts was predicated upon its disputed and doubtful claim to representation of the pilot-engineer (Pet. App. 3a).

3. In such circumstances, it is clear that the "rights" which petitioner says are obliterated by the decision below (Pet. 2) are the claimed but not yet established "rights" to representation of the pilot-engineer and to jurisdiction over the job he holds and the claimed but undetermined "rights" to represent employees having dual seniority in areas where ALPA also claims jurisdiction. The vindication or rejection of these "rights" rests with the National Mediation Board,[3] notwithstanding petitioner's reluctance

[3] See *UNA Chapter, Flight Engineers' International Association, AFL-CIO* v. *National Mediation Board*, 294 F.2d 905 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 956 (1962), a suit challenging an order of the National Mediation Board in which the Board found that pilots, co-pilots and flight engineers theretofore separately represented by Air Line Pilots Association and Flight Engineers' International Association, respectively, constituted a single "craft or class" for representation purposes under Section 2, Ninth of the Act.

(Pet. 23, first full paragraph) to commit to the Board its representational and jurisdictional claims.

> "The Mediation Board makes no 'order.' And its only ultimate finding of fact is the certificate. *Virginian Ry. Co.* v. *System Federation, supra,* p. 562. The function of the Board under §2, Ninth is more the function of a referee. To this decision of the referee Congress has added a command enforcible by judicial decree. But the 'command' is that 'of the statute, not of the Board.' *Id.,* p. 562." *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297, 304 (1943).

Petitioner, therefore, is not "remediless" (see Pet. 20 *et seq.*) before the Mediation Board. It is in precisely the same position as the union parties in *M.-K.-T., supra* where this Court held that the remedy of the unions was to obtain a determination from the Mediation Board. Once the respective areas of authority of the two unions have been established by the Board, petitioner has a complete remedy in the "command" of the statute, "enforcible by judicial decree" as this Court held in the *Switchmen's Union* case.

CONCLUSION

The decision below is correct and there is neither conflict of decision nor any other reason for further review of petitioner's motion for a preliminary injunction. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 19, 1963.

APPENDIX

Opinion by Levet, *D.J.*

(As Reported at 51 LRRM 2105)

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

FLIGHT ENGINEER'S INTERNATIONAL ASSOCIATION, EAL CHAPTER, AFL-CIO,

Plaintiff,

—v.—

EASTERN AIR LINES, INC., and AIR LINE PILOTS ASSOCIATION,

Defendants.

On motion by the Flight Engineers Union for a preliminary injunction restraining an airline and Pilots Union from certain alleged violations of Railway Labor Act. Motion denied.

LEVET, *District Judge*:

This case is but another in a series of cases involving the air transportation industry and rival collective bargaining agents of its flight crews. In this case, the plaintiff, Flight Engineers' International Association (hereinafter "FEIA") seeks to enjoin the defendants, Eastern Air Lines, Inc. (hereinafter "Eastern") and Air Line Pilots Association (hereinafter "ALPA") from certain alleged violations of the Railway Labor Act, 44 Stat. 577, 45 USC § 151 et seq. (1958) (hereinafter "Act"). Presently the case

is before the court on the plaintiff's motion for a preliminary injunction.

For the reasons set forth below, the motion is denied.

This entire dispute has a long factual history, only certain portions of which are relevant to an understanding of this case and the dispositions made. Basically the dispute hinges upon the qualifications of the flight crews on jet aircraft which the two rival collective bargaining agents seek to impose upon the air carriers.

Federal regulations require that jet aircraft and four-engine propeller aircraft carry a basic cockpit crew of three airmen, two of whom must be qualified air pilots and one of whom must possess a Flight Engineers' Certificate issued by the Federal Aviation Agency (hereinafter "FAA"). FEIA insists that the carriers must not qualify pilots as flight engineers or require flight engineers to qualify as pilots and that all flight engineers must possess a mechanics certificate, with powerplant and airframe rating ("A & P" license). The ALPA position is that the carriers must give pilots training as flight engineers, that such training is not to include an A&P license, and that if a three-man crew is used on jet aircraft its third member must possess a commercial pilot license and instrument rating and be qualified to relieve the co-pilot under routine and emergency conditions. Colloquially called the crew complement issue, this problem has received nationwide attention and personal consideration by the President and Secretary of Labor.

The facts pertinent to a decision of this motion begin on November 12, 1958, when Eastern and ALPA entered into a "mediation agreement" which provided that any flight crew of more than two must include ". . . a third crew member who has a commercial pilots license . . . in

addition to any other qualifications he may possess." (Complaint, Ex. 1.) However, FEIA refused to accept pilot qualifications for its members and on November 24, 1958 called a strike against Eastern, which continued for 38 days. On December 31, 1958, FEIA and Eastern entered into an agreement terminating the strike. As part of the settlement, Eastern withdrew without prejudice its demand that flight engineers on jet aircraft have minimum pilot qualifications and agreed for a mechanic trained flight engineer with no pilot qualifications. By the terms of this agreement it was to continue in force until April 1, 1960, renewable thereafter on a yearly basis unless notice of a desire to change the agreement was served by either party on the other prior to April 1 of any year, as required by Section 6 of the Railway Labor Act, 45 USC § 156 (1958).

On January 1, 1959, Eastern and ALPA entered into a Memorandum of Understanding which provided for pilot qualifications of the third pilot and for engineer training of such third pilot leading to the procurement of a Flight Engineers' Certificate. (Complaint, Exhibit 2.)

Eastern now found itself on the horns of a dilemma. The government regulations applicable to Eastern's operations require that jet aircraft and four-engine propeller aircraft carry a basic cockpit crew of three airmen, two of whom must be qualified air pilots and one of whom must possess a Flight Engineers' Certificate issued by the FAA. Eastern's December 31, 1958 contract with the plaintiff required that the flight engineer have, in addition to his Flight Engineers' Certificate, an FAA Airframe and Powerplant License. Eastern's agreement with ALPA required that it carry on all jet flights at least three pilots. Accordingly, Eastern carried a basic cockpit crew of four men, one more than required by FAA regulations. Three of the four were pilots represented by ALPA, the other was a flight engineer represented by the plaintiff.

In February 1960 the plaintiff and Eastern exchanged proposed modifications which each desired to make in their December 31, 1958 agreement. In April the parties exchanged similar notices detailing to a greater extent the changes each desired to make in the agreement. After extensive negotiations based on these proposals failed to yield a settlement, Eastern and FEIA in July 1960 resorted to the mediation services of the National Mediation Board. The case was docketed in July and the Board began to mediate the dispute. The Board offered arbitration as to the method to settle this dispute but this was rejected by the plaintiff. Being unable to mediate the dispute, the Board terminated its services on September 5, 1961.

However, before the Board terminated its services regarding Eastern, it had decided on February 6, 1961, in a case involving United Air Lines, that the pilots and flight engineers constituted a single craft or class of employees for the purpose of collective bargaining under Section 2, Ninth of the Act, 45 USC § 152, Ninth (1958). In protest against this decision, FEIA called a strike on February 17, 1961 against Eastern as well as several other airlines, seriously disrupting the operation of the nation's air transportation system. The strike ended shortly thereafter when, upon Secretary of Labor Goldberg's recommendation, President Kennedy established the so-called Feinsinger Commission to make recommendations with respect to a settlement of the dispute over the crew complement problem. All of the parties to this suit participated in the hearings before the Commission. The Commission issued a preliminary report on May 24, 1961, which stated, in part, that both FEIA and ALPA agreed that a jet crew of three men was adequate and that:

> "The most obvious solution to this problem is merger or some form of consolidation [of the two unions].

> In the considered opinion of the Commission, neither peace nor safety on the airlines will be fully assured as long as there are two unions in the cockpit." Feinsinger Comm'n. Report to the President at 42 (1961).

It should be noted here that many of the facts pertinent to a decision on this motion were found by Judge Feinberg of this court in a recent companion case entitled, *Flight Engineers International Association, EAL Chapter, AFL-CIO* v. *Eastern Air Lines, Inc.*, Civil Action No. 62-2586, 50 LRRM 2929 (affirmed per curiam August 30, 1962, Docket No. 27745, 51 LRRM 2038). The record before Judge Feinberg in regard to these facts was similar to that before me and both FEIA and Eastern were parties. Neither of the parties to that case who are parties here deny the accuracy of the facts as found there. Accordingly, I adopt the facts found by Judge Feinberg in that case, specifically, the findings of fact set forth in pages 6 through 13 of that opinion as filed.

Eastern, in implementing its decision to resume operations, met with ALPA during the period of July 20 through August 6, 1962. These meetings resulted in three agreements dated respectively July 20, August 3 and August 6, 1962. (Complaint, Exhibit 6-A.) It is these agreements which are at the heart of plaintiff's present compaint.

These agreements provided the mechanism whereby the striking flight engineers would be replaced by Eastern's own pilots, after these pilots had been trained to acquire a Flight Engineers' Certificate. Specifically the agreements provided that the pilots would be called for training and assignment in the order of seniority; that taking leave of their assignments to take flight engineer's training, they suspended their seniority bidding rights; that their pilot seniority would not be lost or impaired while training as

pilot-engineers; and that there would be no reduction in pay. (Complaint, Exhibit 6-A.)

On August 7-8, 1962, Eastern met with the plaintiff and presented a new "package" proposal. Plaintiff was informed that if that proposal was not accepted, or if a counterproposal was not forthcoming, Eastern would communicate this latest offer to the individual flight engineers as a basis for their return to work on propeller aircraft, they having already been fully and permanently replaced on jets.

Plaintiff rejected this proposal and made no counterproposals. On August 10, 1962, after expiration of the time within which plaintiff was to accept the "package" proposal, Eastern communicated its proposal to the individual flight engineers. All engineers who returned to work on the basis of the offer were reemployed. All vacancies which existed following the return of such flight engineers have been permanently filled by pilots who have bid for or accepted assignments as pilot-engineers or flight engineers. By August 24, 1962 all flight engineers who had not returned to work had been permanently replaced. On August 25, 1962 Eastern sent to all other flight engineers who had not returned to service a letter advising them that because of their failure to return to work pursuant to Eastern's letters of July 18 and August 10, 1962, they had been permanently replaced and ". . . as a consequence, there is now no further need for your service." (Exhibit K, Jarrard affidavit.)

Plaintiff bases its charge of violation of the Railway Labor Act upon the contention that Eastern has negotiated in bad faith with the plaintiff since it has conditioned any settlement of the dispute upon a merger with ALPA (Complaint, Pars. 29 and 35) and that a conspiracy exists between the defendants to oust plaintiff as the collective

bargaining agent of the flight engineers. (Complaint, Par. 37.)

The Railway Labor Act, 45 USC §§ 151-163, 181-188, provides detailed procedures for the settlement of labor disputes arising in industries covered by the Act. (See *American Airlines, Inc.* v. *Air Line Pilots Ass'n, Inter.*, D.C.S.D.N.Y. 1958, 169 F.Supp. 777, 784, 43 LRRM 2390.) This statutory scheme for the settlement of these disputes retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration and conciliation. Any compulsion which does exist under the Act goes only to insure that the procedures outlined in the Act are exhausted before resort can be had to self-help. *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 725, 16 LRRM 749 (1945).

As was stated by the Court of Appeals of this circuit in *Pan American World Airways, Inc.* v. *Flight Eng'rs Ass'n.*, Nos. 27657-58, 50 LRRM 2801, 2 Cir., July 23, 1962 at 2817-18:

> "When the cooling-off procedures of the Act, including the appointment and report of the Emergency Board, if resort is had to that procedure, are exhausted and the final thirty-day period has elapsed it is quite clear that the Act contemplates the further progress toward the determination of the controversy will be left entirely to the interplay of economic forces without further governmental intervention. The parties are then free from all compulsion under the Act and may resort to 'self help.' . . ."

Based on the record before me, I find, for the same reasons as did Judge Feinberg, that as between the plaintiff and Eastern the procedures of the Act for the settlement of this dispute have been exhausted and that the parties were free to resort to self-help.

Plaintiff's contention of bad faith on the part of Eastern is based on the allegation that Eastern conditioned any settlement of the dispute upon a merger of the plaintiff with ALPA. In support of its contentions, plaintiff introduces five affidavits by various flight engineers employed by Eastern. The affidavits of O. N. Roberts, an Eastern flight engineer and Vice-President of the EAL Chapter of plaintiff, describe two meetings with officials of Eastern, one in New York with Malcolm MacIntyre, President of Eastern, and another in Miami, Florida, with A. M. Beverly, a Manager of Eastern. At both meetings, these officials of Eastern urged as a solution to this problem a merger with ALPA. The affidavits of Frank Van Nest and Philip A. Knudsen relate to a conversation they had with Van G. Rowland, Director of Flight Operations for Eastern, while both were walking a picket line in Miami. The gist of the conversation is that the official urged a merger with ALPA and stated that this was the main stumbling block in the negotiations. The affidavit of Melvin O. Pearce relates an incident where a William Whatley, Director of Labor Relations for Eastern, asked him to see if he could not bring FEIA and ALPA together and work out a solution to this dispute by means of a federation or merger.

Eastern counters this allegation by introducing the affidavits of Messrs. MacIntyre, Jarrard, Whatley, Rowland and Beverly. The substance of these affidavits is that each of the officials denies ever conditioning bargaining with FEIA on merger, although they have often suggested merger as the solution to the problem.

It is not strange that Eastern's management suggested merger as the solution, since this has been the solution offered by many disinterested observers and governmental boards. The Feinsinger Commission, for example, pointed out in its report and recommendations at pages 43-44:

> "... Every disinterested observer, governmental or private, who has expressed an opinion to the Commission shares the view that the flight crew should be represented by one union. The Commission firmly endorses such a solution."

This has also been the recommendation of Mr. George Meany and a similar dispute was settled involving Pan American and Trans World Airlines by the creation of Union Merger Groups.

From the record before me, I find that Eastern has at all times bargained in good faith with FEIA and has not conditioned its bargaining on a merger of FEIA with ALPA.

The allegation of a conspiracy between the defendants is also without merit. During the last five years ALPA has struck or threatened to strike Eastern four times over the crew complement issue. These strikes or threatened strikes occurred on October 4, 1958, January 1, 1959, January 1960 and June 1960. Eastern obtained injunctive relief on three of these occasions. The threatened strikes of October 4, 1958 and January 1959 resulted from Eastern's refusal to accede to ALPA's demands which Eastern knew to be offensive to FEIA. Plainly, this history is inconsistent with plaintiff's allegations of conspiracy.

Thus narrowed, the issue becomes whether the agreements of July 20, August 3 and August 6, 1962 support the charge of conspiracy. These agreements prescribe the procedures under which pilots are to receive training in flight engineer functions and the protection they are to receive as pilots while training and serving as flight engineers. These agreements are consistent and necessary to the courses of self-help which Judge Feinberg found lawful. *Flight Engineer's Assn.* v. *Eastern Air Lines, Inc.*,

supra at p. 33. I find no violation of plaintiff's rights in the execution of these agreements.

Based on the record before me on this motion for a preliminary injunction, I find that the plaintiff has failed to show by clear and convincing facts that Eastern has violated its legal rights or that it has a reasonable probability of success in a final hearing in this case. Accordingly, the motion for a preliminary injunction is denied.

The foregoing constitutes my Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

Settle order on notice.

Dated: September 4, 1962

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IN THE

Supreme Court of the United States

October Term, 1962

No. 980

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION EAL CHAPTER, AFL-CIO,
Petitioner,

v.

EASTERN AIR LINES, INC. and AIR LINE PILOTS ASSOCIATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1962

No. 980

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION EAL CHAPTER, AFL-CIO,

Petitioner,

v.

EASTERN AIR LINES, INC. and AIR LINE PILOTS ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, IN OPPOSITION

Opinions Below

The opinion of the Court below is reported at 311 F. 2d 745. The opinion of the District Court is unofficially reported at 51 LRRM 2105.

Question Presented

Petitioner sought a preliminary injunction to restrain Respondent, Eastern Air Lines, Inc. (Eastern) and Air Line Pilots Association, International (ALPA) from giving effect

to agreements between them of November 12, 1958, January 1, 1959, August 3, 1962 and two other agreements associated with the latter. A preliminary injunction was also sought by Petitioner to require Eastern to deal exclusively with it respecting the combined pilot-engineer job and to exclude ALPA therefrom. The District Court denied the preliminary injunction, finding the presence of good faith bargaining and the absence of any alleged unlawful conspiracy and held such agreements to be valid. The Court of Appeals affirmed the denial of the preliminary injunction, concluded that the nature of the action was one turning about rival jurisdictional claims, the assertion of representation being doubtful, and found an absence of jurisdiction. The question presented is whether the denial of such preliminary injunction and the affirmance of such order was proper.

Statement

Petitioner sought preliminarily to enjoin ALPA and Eastern from giving effect to agreements between them of November 12, 1958, January 1, 1959 and August 3, 1962. It sought also to require Eastern to deal exclusively with it concerning the terms of employment of those serving as pilot-engineers and to exclude ALPA from any participation therein.

With the advent of jet aircraft, disputes arose between Eastern, ALPA and Petitioner, FEIA, EAL Chapter, respecting the qualifications of the third crew member. Presidential Emergency Boards pursuant to Section 10 of the Railway Labor Act were constituted in each of such disputes, the composition of the Boards being identical and the evidence received from FEIA, ALPA and Eastern on the common question of crew complement and qualification of

the third crew member was considered together by the Boards. The reports rendered by the Presidential Emergency Boards in July, 1958, identical on the matter of crew complement and qualifications, found safe and efficient operation of jet equipment to require pilot training and qualification for the third crew member, who was also to have a flight engineer's certificate. These Recommendations were accepted by Eastern and ALPA but rejected by Petitioner, which was unwilling to accept pilot training for its flight engineer members.

Petitioner's assertions (p. 4, *et seq.*) that in 1958 ALPA was attempting to appropriate the flight engineers' jobs and the bargaining rights of EAL Chapter, are not in accord with the facts of record. ALPA's position prior to and in the Presidential Emergency Board proceedings vouchsafed to the engineers their job rights and representation. The recommendations of the Presidential Emergency Board, rejected by EAL Chapter, did likewise.

On November 12, 1958, an agreement was reached between Eastern and ALPA under the auspices of the National Mediation Board, reflecting the requirement that there shall be three pilot-qualified persons in the cockpit. There was yet unresolved the dispute between Petitioner and Eastern regarding the flight engineers' unwillingness to accept pilot training. Essentially over this issue the flight engineers, represented by Petitioner, struck and shut the airline down for 39 days. The engineers were successful in resisting the acceptance of pilot training and qualifications and accordingly, concluded an agreement on December 31, 1958. On January 1, 1959, Eastern and ALPA concluded a contract which reflected their prior agreement and satisfied the Presidential Emergency Board recommendations for the need of additional piloting skills in the jet cockpit by pro-

viding for a third pilot in light of the engineers' refusal to accept such training.

Like agreements were made between ALPA and American Airlines, Inc. in January of 1959, with Pan American World Airways, Inc. in February of 1959, with United Air Lines in May of 1959, with Trans World Airlines in May of 1959, and with Northwest Airlines in August, 1959. A pattern was established in the industry which in fact implemented the Eastern Emergency Board recommendation that additional piloting skill was needed in the jet cockpit and ALPA's crew complement policy to the same effect. As did the Petitioner, Petitioner's affiliate FEIA Chapters on Pan American, Trans World and American, succeeded in bargaining for the continued position of the flight engineer without pilot qualifications in the jet cockpits of such carriers. The crew complement agreements between such carriers and ALPA did not preclude such eventuality on these or any other carriers having comparable agreements.

One of the basic assertions of Petitioner in this proceeding is that Eastern and ALPA conspired to defeat Petitioner's rights in the making of the challenged agreements. This would involve the demonstration, absent in the record, of virtually an industry-wide conspiracy in this matter, including several Presidential Emergency Boards and the President's Commission on the Airlines Controversy.

On United Airlines the National Mediation Board, acting through a Committee of Neutrals, made a determination on crew complement which recognized the rapid technological developments in the aviation industry and the basic concept of crew coordination in which each member of the cockpit complemented the skills and functions of the other and could relieve the other. 3 *Determination of Craft or Class of the National Mediation Board*, p. 56; 67 (1961).

The President's Commission on the Airlines Controversy was established by Executive Order 10921 in February, 1961. Involved in these proceedings were several trunk carriers, including Eastern, operating jet aircraft with a four-man crew.

The President's Commission in its Reports of May and October, 1961, affirmed that jet equipment be operated by a three-man crew, the third member to be pilot-qualified as well as having an engineer's certificate.

An Arbitration Board, appointed at the instance of the President of the United States, consisting of Dr. George Taylor, George Meany and Edgar Kaiser, concluded that the third crew member in a three-man jet crew "involves the combination into one job of the essential tasks now performed by a third pilot and a flight engineer". *National Mediation Board Arbitration No. 271*, May 21, 1962, Air Line Pilots Association, International with Pan American World Airways.

Other carriers not involved in these Commission or Arbitration proceedings but also operating jet equipment had, in the first instance with the addition of the third man, required that he be pilot as well as engineer-qualified. On such carriers, as Braniff and Delta, the recognition of "the combination into one job" has always existed, the third crew member having a flight engineer's certificate being pilot qualified and all flight deck crew members represented as one craft under a single agreement between the carrier and ALPA. Indeed, in the only instance in which the issue was raised and determined whether flight engineers constitute a separate craft as among flight deck employees, there resulted a determination by the National Mediation Board in the *United* proceeding that they are part of a single craft consisting of all members of the cockpit.

In negotiations current between them, Eastern had proposed the implementation of a reduction from four to three crew members in the jet cockpit in accordance with the Report of the President's Commission on the Airlines Controversy. The acceptance of this Report had also been recommended to Eastern and Petitioner by a Presidential Emergency Board established in connection with the then current dispute between Eastern and Petitioner. Petitioner's refusal to accept the proposal and to implement these recommendations was accompanied by a strike of the flight engineers commencing on June 23, 1962.

In its letter of July 19, 1962, Eastern advised ALPA of its intention to reduce from a four to a three man jet crew, utilizing "a Pilot-Engineer" whose "duties will be a combination of the present Flight Engineer duties and Third Pilot Duties performed in the Third Pilot's Position". The Company also called upon ALPA to perform its contractual obligations to accept the necessary training and fly the jet equipment under the agreement of January 1, 1959.

It has been elsewhere determined that Eastern was free to make the changes with respect to the third crew member's position and his training and qualifications, which it set about to do; it being likewise determined that Eastern was free to train and utilize the pilots for the third position. *Flight Engineers' International Association, Eastern Air Lines Chapter, AFL-CIO* v. *Eastern Air Lines, Inc.*, 208 F. Supp. 182 (S. D. N. Y.), aff'd 307 F. 2d 510 (2 Cir. 1962), cert. denied March 18, 1963 (October Term 1962, No. 776).

The agreement of August 3, 1962 (as well as those collateral to it) was noted by the District Court in its opinion reported at 51 LRRM 2105, and in the opinion of the Court of Appeals, 311 F. 2d 745, as being operative to protect the pilots' seniority and related rights. These rights by a pre-

vious and unchallenged agreement between Eastern and ALPA, had been established for such employees. These rights were being protected under the July and August, 1962 agreements while such personnel were functioning in the third crew member's position. The Company sought to use this source of qualified personnel and Petitioner did not question Eastern's right to take advantage of the "convenience of a readily accessible source of manpower" (Petitioner's Br. below, p. 26). Eastern, wishing to assure itself of the availability of such personnel could do so only by protecting them against loss of rights accruing under the pilots' agreement and ALPA, representing such persons, properly entered into such protective agreements.

Under the agreement of January 1, 1959, an obligation extended between ALPA and the Company for the operation of jet aircraft provided they were manned as prescribed in such agreement. Eastern made a point of noticing ALPA's obligation under the January 1, 1959 agreement when the equipment was manned as required.

When in the process of reducing from four to three Eastern became free to make changes, it did so by establishing a combined job. This consolidated the position of the third pilot and the flight engineer and established qualifications therefor. The agreements between ALPA and Eastern reflected the terms of such work assignment and qualifications.

Petitioner's assertion (p. 11, *et seq.*) that there was no consolidation of jobs is contrary to the facts established of record. Petitioner's reference in footnote 14, at page 11, to the provision of the agreement that the Company may cause returning flight engineers "to continue operating such pure-jet flights with a four-man crew" fails to disclose the qualifying language which immediately precedes. Such qualifying language of the agreement is that

> "3. During the period of transition from four-man pure-jet-crews to three-man pure-jet crews, the Company shall have the right to continue, * * * " etc. (Complaint, Exh. 6-A, p. 3)

Nor does this wrench of language out of context by Petitioner gainsay that Eastern was admittedly putting into effect the Report of the President's Commission on the Airlines Controversy which provided for reduction from four to three precisely by combining job functions and qualifications.

All of the parties, including Petitioner, have accepted the principle of a transition from four to three crew members on jet equipment. The carrier has bargained actively and over a lengthy period with both unions concerning the substance of such implementing agreements. Dissatisfaction by one of the contending groups with the outcome of collective bargaining is the essential nature of Petitioner's complaint.

ARGUMENT

Petitioner seeks review by this Court on the same grounds urged below. The decisions by the courts below are in accord with well-established rules of law; there are no conflicting applicable decisions and there is no occasion for review by this Court. The petition should therefore be denied.

(a) The District Court, upon consideration of the affidavits submitted in connection with the motion for a preliminary injunction, concluded that Eastern had "bargained in good faith," and that the claim of conspiracy between Eastern and ALPA for the unlawful defeasance of Petitioner's rights was not proved. The District Court likewise determined that the agreements of July 20, August 3 and

August 6, 1962 describe the protection to be received by pilot personnel while serving as flight engineers and the procedures for the training of such pilots for such service. *Flight Engineers' International Association, Eastern Air Lines Chapter, AFL-CIO* v. *Eastern Air Lines, Inc. and Air Line Pilots Association*, 51 LRRM 2105 (1962).

The Court of Appeals, noting that Eastern had negotiated a series of agreements with ALPA which regulated the retention of the pilots' seniority, their compensation and terms of employment while serving as pilot-engineers, proceeded to deal with the essential nature of Petitioner's complaint. The Court of Appeals evidently regarded Petitioner's entire position as permeated with the issue of rival claims over work assignment and jurisdiction, without which none of Petitioner's claims or assertions has meaning or substance. The rival claims with respect to the "pilot-engineer job" make directly applicable *General Committee* v. *Missouri-Kansas-Texas R. Co.*, 320 U. S. 323 (1943). Therein the Supreme Court held that the solution of such disputes was not within the jurisdiction of the federal courts.

The Petitioner makes certain factual claims, particularly on page 19 of its petition, which are not supported by the record and concerning which contrary determinations were made by the Courts below. Its assertion that the flight engineers might return with the job unchanged, is a repetition of its prior erroneous claim, based upon the use of language of the August 3, 1962 agreement taken out of context. This has heretofore been dealt with. It is clear that there was in fact a combination of jobs and qualifications effected by Eastern. It has elsewhere been made clear that Petitioner does not challenge the right of Eastern to accomplish such changes. Petitioner contends further that the flight engineers and the pilots are trained to perform distinct functions.

It neglects to consider that it was the combination of these functions and coalescence of training and qualifications which has given rise to what is in fact Petitioner's basic complaint over work assignment. It was in the instance of a contest over work assignment that this Court found in *General Committee* v. *M.-K.-T.*, *supra*, the absence of a basis for judicial intervention.

Petitioner misconceives the effect of its certification by the National Mediation Board. The National Mediation Board, charged with administration of the Railway Labor Act and the determination of certification upon which Petitioner relies, made clear the limitations upon certification, stating as follows:

> "A certification by this Board to an organization gives that organization the right to bargain for the employees in the craft or class. It does not in itself, however, give the employees of that craft the right to exclusive performance of certain work. That becomes a matter for collective bargaining." In *Matter of Representation of Employees of the American Airlines, Inc.—Technical Foremen*, 3 *Determination of Craft or Class of the National Mediation Board*, page 53 (1959).

The National Mediation Board has recognized the function of management in establishing new or combined jobs reflecting changing technology whereunder it becomes necessary to draw upon established craft groupings for qualified personnel. Carriers have had to make choices at times between two established groups, the personnel of each of whom may have a part of the qualifications needed for the combined job to be established. The opportunity to exercise such choice has been uniformly accepted and as such was taken into account by the Board in subsequent representa-

tion proceedings. *Matter of Representation of the Employees of American Airlines, Inc.—Reservisor Technicians, 2 Determination of Craft or Class of the National Mediation Board,* page 3 (1953).

Petitioner's complaint at page 20 and following, that it is left without remedy, misconceives the decision of this Court in *General Committee* v. *M.-K.-T.*, *supra*, and *General Committee* v. *Southern Pacific Co.*, 320 U. S. 348 (1943). In the instant case there are rival claims as to a work assignment, a combining of jobs and qualifications which has been legally effected, giving rise to secondary effects, including doubt as to representation. Representation problems may properly and exclusively be referred to the National Mediation Board. This Court in the *M.-K.-T.* case noted that situations may arise under the Railway Labor Act

> "where neither the administrator nor the judicial function can be utilized."

The National Mediation Board has consistently with this determination held that the effect of its certification does not give

> "a right to exclusive performance of certain work. That becomes a matter for collective bargaining."

(b) Petitioner claims that the decision of the Court below conflicts with the decision of this Court in *Brotherhood of Railroad Trainmen* v. *Howard*, 346 U. S. 768 (1951), and decisions of other Courts of Appeals. The decision in the *Howard* case is quite inapposite. That case concerned with the discriminatory exclusion of negro workers, did not involve the instant considerations of the combination of two jobs into one, rival claims over the combined job and consequential representation problems.

Likewise, Petitioner's reliance upon *Brotherhood of Railroad Trainmen* v. *Smith*, 251 F. 2d 282, cert. denied, 356 U. S. 937 (1938), as presenting a conflict is insubstantial. In the *Smith* case there was a complete absence of dispute over work assignment, jurisdictional issues or representation. Nor do the other cases cited by Petitioner present any conflict or need for resolution by this Court.

Reference by Petitioner to the Fifth Circuit Court of Appeals decision in *Railway Conductors* v. *Switchmen's Union*, 296 F. 2d 726, cert. denied, 361 U. S. (1959), as presenting a conflict is likewise not well grounded. No rival jurisdictional claims over work assignment nor combination of jobs or qualifications were factors in that case. The further references by Petitioner to cases involving enforcement of arbitration agreements seem to present no considerations relevant to this petition.

For the reasons stated herein the petition for writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 980

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, EAL CHAPTER, AFL-CIO,
Petitioner

v.

EASTERN AIR LINES, INC., and AIR LINE PILOTS ASSOCIATION,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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STATUTES

Railway Labor Act, 45 U.S.C. § 151 *et seq.*:

Section 2, Third 9-10

Section 2, Fourth 10

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REPLY BRIEF OF PETITIONER

INTRODUCTION

Both Respondents, Eastern Air Lines, Inc. ("Eastern"), and Air Line Pilots Association ("ALPA"), have filed briefs in opposition to the Petition for Certiorari. This reply is submitted in response to both.

The nature of the briefs in opposition makes it imperative at the outset for Petitioner to discuss what this case *is not* about, because that is what Respondents have chosen to concentrate on.

First, this *is not* an appeal from the judgment of the Court of Appeals affirming the District Court on the merits of the claims stated in Petitioner's complaint. Rather, it is an appeal from the judgment of the Court of Appeals in which injunctive relief was denied on the threshold ground

that the District Court lacked jurisdiction to decide the merits.[1] The Court of Appeals never reached the merits. For this reason, ALPA's positing of the "Questions Presented" (ALPA 2, 8) [2] in terms of the merits as they were ruled upon by the District Court is improper, and serves only to distract attention from the real questions presented.

Second, this case *is not* about Judge Feinberg's opinion in the first case, or the appeal and denial of certiorari therein. Eastern devotes considerable space to a discussion of that case, which was decided on its merits and not on any jurisdictional ground, as if the instant action were the same, in order to characterize the instant action as "relitigation." (East. 4-5) Petitioner has already clearly indicated that the complaint in the instant case raises on its merits (matters not before this Court) matters separate and apart from those presented in the prior action. (Pet. 3) In fact, one crucial claim of the instant complaint is premised on the decision in that prior action: namely, assuming as Judge Feinberg held, that Eastern is free to unilaterally effect changes in its collective bargaining agreement with the Petitioner, and may bargain with the individual flight engineers over such changes, is Eastern also free to negotiate with another union respecting those changes? Petitioner thinks not, and seeks review here in order to put this question, among others, before the Court of Appeals once it has overcome the jurisdictional hurdle erected by that Court.

Third, this case *is not* an attempt by Petitioner to have this Court try *de novo*, or otherwise exercise judicial review of, the various Emergency Board proceedings under Section 10 of the Railway Labor Act, 45 U.S.C. § 160, re-

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[1] Accordingly, Petitioner did not append to its Petition the District Court decision. The confusion, which Petitioner hoped to avoid thereby, unfortunately has been injected back into this case by Respondents' unwillingness to distinguish between a judgment on the merits and one on jurisdiction.

[2] Hereinafter, references to the Briefs in Opposition of ALPA and Eastern will be indicated "ALPA —," "EAST. —," respectively.

ferred to by Respondents, which relate to crew complement. The efforts of Respondents, especially of ALPA, to rationalize their unlawful actions by suffuse references to agreements similar to those challenged here, which have been negotiated by ALPA with other carriers, and which have found favor with Emergency Boards and the extra-statutory Presidential Commission, can only serve the purpose of distracting this Court from the one issue properly before it, the jurisdiction of the Court below. Those agreements, negotiated under totally different circumstances, are irrelevant here.[3]

Questions Presented and Why the Petition Should Be Granted

The two questions presented by the Petitioner are:

1. "Did the Court below properly apply the doctrine of *M-K-T* to this case, where the effect of such application is to obliterate rights guaranteed by the Railway Labor Act, and to leave Petitioner remediless?" (Pet. 2)

[3] This would be true even if those agreements had been accurately described by ALPA, which they were not. Where those agreements resulted in a three-man crew, in all cases but two, they were negotiated either with the acquiescence of the Flight Engineers' International Association, or where FEIA was not, and had never been, the bargaining representative for flight engineers. The two exceptions, Continental Air Lines and Western Airlines, have been the subject of Court action on complaint of FEIA. See *FEIA, CAL Chapter* v. *Continental Air Lines*, 297 F.2d 397 (9th Cir. 1961), *cert. denied*, 369 U.S. 871 (1962); *WES Chapter, FEIA* v. *National Mediation Board*, Civil No. 2509-61, D.D.C., Nov. 6, 1961, *cert. denied*, 368 U.S. 953 (1962) (in advance of judgment of Court of Appeals), *aff'd*, 51 L.R.R.M. 2476 (D.C. Cir. 1962).

However, in neither of these two judicial challenges did FEIA achieve review of the merits. In the *Continental* case, the controversy was held to be moot; in *WES Chapter*, review was denied for want of jurisdiction under the rationale of *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943).

In none of the other examples referred to by Respondents did the carrier, in implementing the third-pilot agreement, alter the job title of the flight engineers and then advise them, as Eastern did here, "You are now a 'pilot-engineer' represented by ALPA." In these other examples, the carriers continue to recognize and bargain with FEIA.

2. "If it did, should that doctrine continue to be followed by this Court?" (*Ibid*)

Petitioner believes these questions merit the consideration of the Court because, in the first place, the Court below misapplied *M-K-T*, and erred in extending its holding, that a nonjusticiable "jurisdictional" dispute between two unions was involved, to the instant case which presents entirely different issues. Respondents make no real attempt to refute Petitioner's analysis of *M-K-T* and how it differs from the instant case. Instead, Respondents content themselves with the same overl -broad generalizations used by the Court below in rationalizing the application of *M-K-T* here: (1) two unions are involved (East. 9). This of course proves too much, and would defeat federal court jurisdiction anytime this phenomenon occurred regardless of the facts of unlawful action; (2) dual seniority exists (East. 9-10). This simply is not so. No pilot may "bump" a flight engineer out of a flight engineer job, because he has no flight engineer's seniority (Pet. 19-20); and (3) a work-assignment dispute is involved (ALPA 9). This, too, is not so (Pet. 19).

As its second reason for urging the granting of certiorari in this case, Petitioner has pointed specifically to a conflict between the circuits. Respondents have made no significant response to this contention. Eastern makes the astonishing statement (East. 10) that Petitioner "does not even attempt to show any area of conflict." Apparently Eastern has completely overlooked Petitioner's analysis of the conflicting decisions at pp. 25-29 of its Petition. Then Eastern itself proceeds to omit discussion of three (Pet. 28-29) of the four decisions in conflict cited by Petitioner. ALPA, in turn, omits any discussion of two of those cases. The conflict in decisions cited by Petitioner cannot be so easily disposed of, by pretending the cases do not exist.

Third, Petitioner argues that the two Questions Presented deserve this Court's consideration because Petitioner will be left remediless if the disputed application of *M-K-T*

is sustained.[4] On this issue, Petitioner's claim is, in barest form, as follows: Petitioner is the certified bargaining representative of Eastern flight engineers. Eastern has refused to bargain with Petitioner and, as Eastern concedes in its brief, has negotiated with ALPA concerning *flight engineers working as flight engineers.*[5] Neither the National Mediation Board, nor the bipartisan Flight Engineer System Board of Adjustment, has jurisdiction to remedy the violations of the Railway Labor Act stated in Petitioner's complaint.[6] Only the courts remain to hear and determine Petitioner's claims if an obliteration of rights is to be avoided.

Eastern's sterile response that "Petitioner . . . is not

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[4] This Court has very recently indicated that Petitioner's construction of *M-K-T* is proper, that the Court's holding therein must be limited to those cases where an obliteration of guaranteed rights would not result. In *International Association of Machinists, AFL-CIO* v. *Central Airlines, Inc.*, 31 U.S.L. Week 4335, 4338 n. 13 (U.S. April 16, 1963), this Court noted:

> "The absence of a specific statute conferring jurisdiction, in addition to §§ 1331 and 1337, was of no moment in such cases. See *Tunstall* v. *Brotherhood of Loc. Engrs.*, 232 U.S. 210, 213; *Leedom* v. *Kyne*, 358 U.S. 184, 189-190. These cases, and the one at bar, are unlike such cases as *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, and *General Committee* v. *M-K-T R. Co.*, 320 U.S. 323 where Congress intended no judicial review and *its denial impaired no federal rights.*" (Emphasis added.)

[5] Eastern concedes in its brief what Petitioner claims is self-evident on face of the challenged bargaining agreements with ALPA, i.e., that Eastern and ALPA have bargained over the wages and terms and conditions of employment of *flight engineers* in the face of Petitioner's certification as the sole bargaining agent of employees in that classification. Specifically, Eastern admits that: "Eastern . . . trained . . . pilots for flight engineer's certificates so that they could qualify as 'pilot-engineers' *or flight engineers*. . . ." (East. 2) "[The three agreements] relate to terms and conditions of employment of pilots, as pilots, while they are serving as pilot-engineers *or flight engineers.*" (East. 8) (Emphasis added.)

[6] Respondents do not even purport to rebut Petitioner's argument (Pet. 20-23) that Mediation Board authority is lacking to decide Petitioner's claims, or to rebut Petitioner's argument (Pet. 23-25) that under that part of the Railway Labor Act dealing with air carriers no effective means exists to determine the dispute alleged.

remediless" (East. 12) is as totally inadequate, as it is unsupported. The fact remains that Petitioner is remediless, and could not possibly obtain any relief from resort to the Mediation Board. Petitioner has long ago obtained all that the Mediation Board is empowered to confer, a certification as exclusive bargaining representative for the flight engineers. There is nothing that the Mediation Board can do to compel Eastern to respect that certification, and to cease and desist from dealing with a different union. Unlike the National Labor Relations Board, the Mediation Board simply does not have that authority (Pet. 21, n. 21). Eastern, of course, recognizes this and thus does not disclose what relief Petitioner could obtain from the Mediation Board. (East. 12)

The sole remedy available to Petitioner is what the courts can provide under the rationale of *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515 (1937), *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1951), and *Leedom* v. *Kyne*, 358 U.S. 184 (1958), in order to avoid an obliteration of guaranteed rights.

It is understandable that ALPA does not wholeheartedly[7] join with Eastern in arguing that the Mediation Board is the only forum before which Petitioner can present the claims stated in its complaint. *ALPA has recently filed in the same United States District Court as did Petitioner, a complaint against American Airlines identical to that filed by Petitioner herein*, charging American with, *inter alia*:

(1) refusing to "comply with ALPA's request that the employer refrain from engaging in collective bargaining with the unauthorized committee of pilots concerning the rules, rates of pay, working conditions of the crafts or class of pilots. . . ."

(2) "continuing to treat with persons who are not an-

[7] ALPA claims only that Petitioner "misconceives the decision of . . . M-K-T." (ALPA 11) The reasons given by ALPA why this is so are precisely those stated by Petitioner (Pet. 32-33) in support of its request for reconsideration by this Court of the decision in *M-K-T* and *Southern Pacific*.

> thorized to engage in collective bargaining concerning rules, rates of pay and working conditions of the craft or class of pilots. . . .'"[3]

By some strange process of reasoning *M-K-T* is a bar to the instant suit but no bar to an identical suit filed by ALPA. The compelling logic would seem to have required ALPA to join Petitioner in requesting that certiorari be granted.

Yet another consideration supports the granting of certiorari in this case. Let us assume, for the purpose of discussion, that it could properly be said that the circumstances present here involve an existing or potential representation or jurisdictional dispute between FEIA and ALPA over which the National Mediation Board has jurisdiction. The fact still remains that Eastern did not wait for the Mediation Board, or any other tribunal, to resolve such dispute. By entering into agreements with ALPA covering the flight engineers it arrogated to itself the determination of matters which, by its own thesis, are the exclusive function of the Mediation Board.

Long ago, the National Labor Relations Board faced an identical problem. With judicial approval, it has held, under what is known as the *Midwest Piping* doctrine, *Midwest Piping and Supply Co.*, 63 NLRB 1060 (1945), that the Labor Act imposes a strict duty of neutrality upon an employer who is faced with rival representation claims, and that the employer violates the Act by entering into an agreement with one union at a time when the claim of another union has raised a real question of representation.

In *Midwest Piping*, the Labor Board held:

> "We agree, however, with the Trial Examiner that after the close of the original hearing herein, the respondent violated the Act by entering into a 'union shop' agreement with the Steamfitters. The respondent knew at the time that the contract was executed, that there existed a real question concerning the rep-

[3] The entire complaint of ALPA is appended hereto as Appendix A.

resentation of the employees in question. The record shows that both the Steamfitters and the Steelworkers had vigorously campaigned in the plant, had apprised the respondent of their conflicting majority representation claims, and had filed with the Board conflicting petitions, which are still pending, alleging the existence of a question concerning the representation of the employees covered by the agreement. Under such circumstances, the Congress has clothed the Board with the exclusive power to investigate and determine representatives for the purposes of collective bargaining. In the exercise of this power, the Board usually makes such determination, after a proper hearing and at a proper time, by permitting employees freely to select their bargaining representatives by secret ballot. In this case, however, the respondent elected to disregard the orderly representative procedure set up by the Board under the Act, for which both unions had theretofore petitioned the Board, and to arrogate to itself the resolution of the representation dispute against the Steelworkers and in favor of the Steamfitters. In our opinion such conduct by the respondent contravenes the letter and the spirit of the Act, and leads to those very labor disputes affecting commerce which the Board's administrative procedure is designed to prevent.

"We further find that the respondent's afore-mentioned conduct also constitutes a breach of its obligation of neutrality. As we have previously held, a neutral employer, on being confronted with conflicting representation claims by two rival unions, 'would not negotiate a contract with one of them until its right to be recognized as the collective bargaining representative had been finally determined under the procedure set up under the Act.' Here, the respondent knew that the Board already had jurisdiction over the existing question concerning the representation of the employees covered by the contract, and that, in accordance with its usual practice, the Board would not proceed to a resolution of that question until it had passed upon the then pending original complaint herein, hearing on which had already been concluded. That no unfair labor practices are found herein on the original complaint does not alter the effect of the respondent's later breach of its neutrality obligation.

> "We are of the opinion and find that the respondent, by executing a 'union shop' agreement with the Steamfitters in the face of the representation proceedings pending before the Board, indicated its approval of the Steamfitters, accorded it unwarranted prestige, encouraged membership therein, discouraged membership in the Steelworkers, and thereby rendered unlawful assistance to the Steamfitters, which interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act." 63 NLRB at 1069-1071 (Footnotes omitted)

Accord, NLRB v. *Signal Oil and Gas Co.*, 304 F.2d 785 (5th Cir. 1962); *NLRB* v. *Clegg*, 304 F.2d 163 (8th Cir. 1962); *NLRB* v. *Marcus Trucking Co.*, 286 F.2d 588 (2d Cir. 1961); *NLRB* v. *Eastern Massachusetts Street Railway Co.*, 235 F.2d 700 (1st Cir. 1956); *Maryland News Co.*, 138 NLRB No. 28 (1962); *Novak Logging Co.*, 119 NLRB 1573 (1958); *Cf. International Ladies Garment Workers' Union* v. *NLRB*, 366 U. S. 731, 737-740 (1961).

See also *Neo Gravure Printing Co.*, 136 NLRB No. 127 (1962) (agreement assigning to Paper Handlers Union work performed in unit for which Mailers Union is designated bargaining agent held unlawful); *Metropolitan Millwork, Inc.*, 138 NLRB No. 129 (1962) (employer violated Labor Act by entering into contract with union at time when employees were engaged in strike and picketing on behalf of another union seeking renewal of expired agreement); *Brown* v. *Pacific Telephone and Telegraph Co.*, 218 F.2d 542 (9th Cir. 1954) (District Court erred in refusing to issue injunction against employer which dealt with rival union, under circumstances obliging employer to deal only with certified union.)

The same duty of strict neutrality is imposed by the terms of the Railway Labor Act.[9] And the enforcement of

[9] Section 2, Third, 45 U.S.C. § 152, Third, provides in pertinent part that:

> "Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any

that duty, which, again, is beyond the authority of the Mediation Board, is nowhere vested if it is not vested in the federal courts under the principle of *Virginia Ry.*

Accordingly, the Court below erred in denying jurisdiction even if it be assumed—contrary to fact—that a representation dispute existed. The Court had jurisdiction to prevent Eastern from violating its obligation of neutrality, even if it did not have jurisdiction to compel Eastern to continue to deal with FEIA.[10]

In any event, that precise issue—the applicability of the *Midwest Piping* doctrine under the Railway Labor Act—has never been ruled upon by this Court. Yet, it is of vital importance in the administration of the Act, particularly if *M-K-T* is considered as having continued vitality. Standing alone, and apart from all of the other considerations discussed herein, and in the Petition, this factor warrants the granting of certiorari.

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way interfere with, influence, or coerce the other in its choice of representatives."

Section 2, Fourth, 45 U.S.C. § 152, Fourth, provides in pertinent part that:

> "No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization. . . ."

[10] ALPA's argument to the contrary (ALPA 10) is misleading and distorts the controlling legal principles. Of course a certificate is not an exclusive license to perform certain work, and of course work assignments are matters of collective bargaining. Petitioner has never argued otherwise. A certificate is, however, an exclusive license to bargain over the work assignments of the employees in the bargaining unit. Eastern is not free to ignore this exclusivity, and is not free to bargain with whomever it pleases. It was to vindicate Petitioner's status as the exclusive collective bargaining representative over all matters affecting the employment relationship, including work assignments, that the complaint was filed herein to compel Eastern to honor Petitioner's certificate by bargaining with it concerning work assignments of flight engineers, rather than bargaining with ALPA.

Conclusion

For the reasons stated in the Petition, and herein, the Petition should be granted.

Respectfully submitted,
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APPENDIX A

United States District Court

FOR THE SOUTHERN DISTRICT OF NEW YORK

Verified Complaint
No. 63 Civ. 585

CHARLES H. RUBY, as President of the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, an unincorporated association,
Plaintiffs,

against

AMERICAN AIRLINES, INC., *Defendant.*

Come now plaintiffs, CHARLES H. RUBY as President of AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, and complain of AMERICAN AIRLINES, INC., defendant, and allege as follows:

1. This action for an injunction and declaratory judgment arises under the Railway Labor Act, as amended, hereinafter called the "ACT," 44 Stat. 577, as amended, 45 U.S.C. § 151 *et seq.*

2. This Court has jurisdiction of this action under 28 U.S.C. 1331, 1337, 2201 and 2202.

3. Plaintiff Charles H. Ruby is the President of Air Line Pilots Association, International (hereinafter called "ALPA"). Plaintiff ALPA is an unincorporated association organized for the purposes and objects of a labor union. ALPA has actively represented pilots for purposes of collective bargaining since 1933. It is now the recognized representative of more than 14,000 professional air line pilots and other air carrier employees in the United States. ALPA is the collective bargaining representative of all airline pilots employed by all scheduled air carriers in the United States. It currently has collective bargaining agreements covering pilots and other crew members with approximately 46 common carriers by air.

4. Plaintiff ALPA is a "representative" as that term is defined in Section 1 (Sixth) of the Act, 44 Stat. 577, as amended, 45 U.S.C. 151 (Sixth).

5. Defendant American Airlines, Inc., (hereinafter called "American") is now and at all times material to this action was engaged in the business of providing air transportation service as an air carrier and is certificated under the provisions of the Federal Aviation Act of 1958.

6. American is a common carrier by air engaged in interstate commerce and is a "carrier" as defined in Section 1, (First) of the Act, 44 Stat. 577, 45 U.S.C. 151 (First).

7. Defendant resides, and is doing business, within the judicial district of the Southern District of New York.

8. This action is brought by ALPA in its own behalf and for and in the interests of all of the pilots in the employ of carriers who are parties to collective bargaining agreements with ALPA.

9. ALPA is now the recognized, duly designated and authorized representative of the craft or class of pilots employed by American.

10. Since 1939 all collective bargaining agreements and changes in rules, rates of pay and working conditions covering pilots in the employ of American have been effected only with the express authorization and approval of ALPA. Negotiations have been uniformly conducted and continued only with the express consent and approval of ALPA acting by its President. Every collective bargaining agreement with American covering the pilots in its employ has been made with and executed by ALPA, by its President, as the representative of the pilots in the employ of American.

11. ALPA, by its President, has executed and is a party to the collective bargaining agreements governing the rules, rates of pay and working conditions of pilots in the employ of American, as well as all other scheduled air carriers in the United States. Modifications of such agreements by such scheduled air carriers, including American, or by

ALPA, have been initiated by the carriers' notice of intended change addressed to ALPA, or by ALPA's notice addressed to respective carriers.

12. On July 24, 1959, American and ALPA entered into a collective bargaining agreement covering the airline pilots in the service of American. That agreement was amended, in respects not here material, by agreement effective June 1, 1961.

13. Section 1 of that agreement provides:

"RECOGNITION:

The Air Line Pilots Association, International, has shown satisfactory proof to the Company of the fact that it represents more than a majority of the air line pilots of the Company."

14. Section 33 of that agreement provides:

"DURATION:

This Agreement shall become effective January 21, 1959, except as otherwise stated herein, and shall continue in full force and effect until June 1, 1961, and shall renew itself without change until each succeeding June 1st thereafter unless written notice of intended change is served in accordance with Section 6, Title I of the Railway Labor Act, as amended, by either party hereto at least sixty (60) days prior to June 1, 1961, or June 1st of any subsequent year."

15. In accordance with the provisions of Section 33 of the Agreement, ALPA served a notice of intended change on American and American served a notice of intended change on ALPA at least sixty (60) days prior to June 1, 1961. American's notice of intended change was addressed to Clarence M. Sayen, then the President of ALPA.

16. No change in Section 1 of the Agreement, "RECOGNITION," was proposed by American or ALPA in the aforesaid respective notices.

17. The notice of intended change served upon ALPA by American as relating to the matter of the training and qualification of crew members on jet aircraft, stated:

"The Company further reserves the right to propose any additions, deletions, modifications or other changes in the Agreement which may be warranted as a result of the findings or recommendations of the Commission appointed by the President of the United States on February 21, 1961, pursuant to Executive Order No. 10921 to investigate the dispute between certain air carriers and the Flight Engineers International Association."

18. The President of the United States had theretofore, by Executive Order No. 10921, established a President's Commission on the Airlines Controversy, which reported to him on the subject of the training and qualifications of crew members on jet aircraft. The last such report was rendered on October 17, 1961. At the instance of the President of the United States and the Secretary of Labor, a Board of Arbitration, consisting of Dr. George W. Taylor, Professor of Industrial Relations, George Meany, President of the AFL-CIO, and Edgar Kaiser, industrialist, was constituted to investigate and issue an award concerning the training and qualifications of the third crew member on jet aircraft operated by a three-man crew, and an award by that board was made on May 21, 1962. A Presidential Emergency Board created pursuant to the provisions of Section 10 of the Railway Labor Act, as amended, was established to report on a dispute involving Eastern Air Lines and its *flight deck employees*, and after many months of hearing evidence relating to the training and qualification of the third crew member on jet equipment, this Board issued its report on July 21, 1958. In each of the foregoing reports and awards it was uniformly determined that the third crew member on jet aircraft operated by a three-man crew should possess at least a commercial pilot's license, an instrument rating and certain additional pilot qualifications. Like conclusions were reached by other public boards and agencies in kindred proceedings. The training and qualifications so determined formed the basis of agreement for the pilots and the flight engineers with Pan American World Airways, Inc. On Trans World Airlines,

similar agreements were reached utilizing these determinations as a basis of settlement, and such basis of settlement was publicly approved and endorsed by the President of the United States, the Secretary of Labor, the President's Commission on the Airlines Controversy and the National Mediation Board.

19. ALPA had theretofore conducted an extensive study concerning the training and qualifications for the third crew member necessary to insure the safe operation of jet equipment. In 1956, as a result of this study, ALPA, in the interests of safe operations, and by its Board of Directors duly elected by the membership, adopted a policy which comprehended that the third crew member on jet equipment should possess at least a commercial pilot's license, instrument rating and certain additional pilot training.

20. Under the Constitution and By-Laws and policy of ALPA, negotiations and the resulting agreement for the pilots employed by American must fall within and implement the aforesaid minimum standard and policy which requires the third crew member in a three-man jet crew to possess said minimum pilot qualifications. Plaintiff Charles H. Ruby, President of ALPA, and ALPA's Executive Committee, consisting of international officers duly elected by the membership of ALPA, are likewise required to implement such qualifications as are reflected in the aforesaid public determination and policy. Under the Constitution and By-Laws and policy of ALPA, its President and officers may not execute or conclude an agreement which does not include such minimum pilot qualifications for the third crew member.

21. In the course of negotiations with American, ALPA, by its President, took the position and clearly advised American that the agreement must provide for the pilot qualification and training of flight engineers now in the employ of American who are to serve as third crew members on jet aircraft operated by a crew of three men.

22. Upon information and belief, American claims to

be unwilling to provide said pilot training and qualifications for the third crew member in a three-man jet crew without withholding from the proposed agreement certain unrelated benefits which it says it is otherwise prepared to extend. Such position by American is contrary to the notice of intended change given by it.

23. A committee of pilots in the employ of American attending the negotiations has taken the position that ALPA abandon its standard for pilot qualification of the third crew member on American's jet aircraft, and that it should, instead, seek an agreement with American containing the aforesaid unrelated benefits.

24. Charles H. Ruby, President of ALPA, advised the committee of American pilots that, pursuant to ALPA's Constitution and By-Laws, the mandatory ALPA policy requiring pilot qualification for third crew members on jet aircraft could not thus be abandoned. He directed that ALPA continue to bargain with American for the pilot training and qualifications of third crew members.

25. When initial efforts to compose the disagreement between ALPA and the committee of pilots were not fruitful, the negotiations between ALPA and American, in progress since April, 1961, were recessed on or about November 28, 1962. Authorized negotiations have not yet been resumed.

26. Negotiation of prior collective bargaining agreements between ALPA and American have been conducted only with the express consent and authority of ALPA, by its President, with his personal designee being present, and accompanied by a committee of pilots employed by the carrier involved. While this pattern for negotiations is generally followed among local pilot groups, it is nevertheless true in every case that ALPA alone, and not the individual pilots or their committee, is a party to the agreement ultimately reached, and such agreements have never been valid or enforceable until they have been executed by the President of ALPA.

27. Upon information and belief, American, subsequent

to January 11, 1963, has been engaging in conferences or negotiations with a committee of pilots employed by American Airlines concerning the rules, rates of pay and working conditions of the craft or class of pilots employed by American. Upon information and belief, these negotiations or conferences have been held and are now being held for the purpose of concluding a collective bargaining agreement concerning the matters opened for change by the notices of intended change dated March 30 and March 31, 1961. Upon information and belief, representatives of American and members of the pilot committee have the stated intention of concluding a collective bargaining agreement purportedly covering the craft or class of pilots employed by American.

28. Article XVIII of the Constitution and By-Laws of the Air Line Pilots Association, International, provides:

> "Conferences or negotiations shall not be initiated, carried on, or concluded in the name of the Association by any member, group, or groups of members thereof to make or establish employment agreements relating to rates of pay, rules or other conditions of employment, or any other agreements, contracts, or documents of a similar or related character, or any other form of agreements, contracts, or documents without the prior approval of the Executive Committee or the President. Any and all agreements, contracts, or documents of any and every character whatsoever shall not become effective, binding or operative unless and until they bear the signature of the President or other officer or officers duly authorized so to sign by the Board of Directors, Executive Board or Executive Committee."

29. Upon several occasions subsequent to January 11, 1963, ALPA, by its President, plaintiff Charles H. Ruby, notified and advised American that the committee of pilots is not authorized either to negotiate with or conclude an agreement with American governing the pilots employed by that carrier. ALPA has, in addition, notified and advised American that ALPA, by its President, is the exclusive bargaining representative of its pilots, and that any

agreement which the committee concludes with American will neither be executed nor honored by ALPA. ALPA has, since that date, requested that American meet with it for the resumption of authorized negotiations.

30. Notwithstanding the foregoing, American has continued up to the present time to negotiate with the committee of pilots concerning the rules, rates of pay, and working conditions of its pilots. American has refused to resume collective bargaining negotiations with ALPA, the duly designated recognized bargaining agent of its pilots. American has, in reply to the foregoing notices from ALPA, stated its determination to continue negotiating with the committee of pilots until an agreement is concluded.

31. American has failed and refused to comply with ALPA's request that the employer refrain from engaging in collective bargaining with the unauthorized committee of pilots concerning the rules, rates of pay, or working conditions of the craft or class of pilots employed by American.

32. American, in violation of Section 2 of the Act, has failed and refused to treat with ALPA as the duly designated representative of the craft or class of pilots employed by American.

33. American, in violation of Section 2 of the Act, has proceeded to, and is continuing to treat with persons who are not authorized to engage in collective bargaining concerning rules, rates of pay and working conditions of the craft or class of pilots employed by American.

34. American, in violation of Section 2, Third, of the Act, is interfering with, influencing and coercing its employees in the exercise of their freedom of choice as to representatives.

35. American, in violation of Section 2, Fourth, of the Act, has interfered with the representative rights of its employees provided by the Act. American has influenced and coerced said employees in an effort to induce them not to remain members of ALPA. American has maintained, assisted and contributed to the conduct of unauthorized

collective bargaining between American and persons other than ALPA, the duly designated and authorized representative of the craft or class of pilots in the employ of American, in violation of its obligations and other rights of such employees provided for under the Act.

36. American, in violation of Section 2 of the Act, is interfering with the right of ALPA to treat with the employer concerning said rules, rates of pay and working conditions of the craft or class of pilots employed by American.

37. American is engaged upon a course of conduct which, if permitted to continue, will result in changes in rules, rates of pay, or working conditions, in a manner prohibited by Section 2 (Seventh) of the Act.

38. By engaging in collective bargaining with persons other than the true representative of the craft or class of pilots employed by American, defendant has undermined the status of ALPA as the recognized and duly designated representative of that craft or class.

39. By reason of the foregoing, American has violated and is violating the positive mandates of the Railway Labor Act, and specifically Section 2 (First), (Third), (Fourth), (Seventh), and (Ninth) and Section 6 of the Act.

40. Plaintiffs verily believe that these violations of the Act by American will continue unless and until they are enjoined and restrained by an appropriate order of this Court.

41. Substantial and irreparable injury has resulted and will result to plaintiffs, to the pilots in American's employ, and to others as a result of American's acts in violation of the mandates of the Act.

42. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs pray:

1. That this Honorable Court issue a preliminary injunction restraining and enjoining American from engaging in negotiations or collective bargaining concerning the rules, rates of pay and working conditions of the craft or class of pilots employed by American with any person or group

other than the duly designated and recognized collective bargaining representatives of said craft or class, ALPA, by its President, Charles H. Ruby, or his designee.

2. That this Honorable Court issue a preliminary injunction restraining and enjoining American from making any agreement for or changes in rules, rates of pay, or working conditions, or making any agreements or changes except such agreement or changes as may result from collective bargaining between American and the duly designated and recognized representative of the craft or class of pilots employed by American, ALPA, by its President, Charles H. Ruby, or his designee.

3. That this Honorable Court issue a preliminary injunction restraining and enjoining American from refusing to bargain collectively with the duly designated representative of the craft or class of pilots employed by American, ALPA, by its President, Charles H. Ruby, or his designee.

4. That this Honorable Court make and enter its judgment upon the conclusion of the trial of this action declaring the rights of the parties and making permanent the provisions of the preliminary injunction prayed for herein.

5. That damages be awarded to plaintiffs in an amount to be determined by the Court as compensation for the defendant's wrongful course of conduct by which it has undermined the status of ALPA as collective bargaining representative of the craft or class of pilots employed by American, and of pilots employed by all other scheduled air carriers in the United States.

6. That plaintiffs be awarded such other and further relief to which they may be entitled.

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